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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. ~~1211~~ ~~862~~ ~~535~~ 185

THE PEOPLE OF THE STATE OF NEW YORK EX REL. THE NEW YORK ELECTRIC LINES COMPANY, PLAINTIFF IN ERROR,

vs.

ROLLIN M. SQUIRE, AS COMMISSIONER OF PUBLIC WORKS IN AND FOR THE CITY AND COUNTY OF NEW YORK.

IN ERROR TO THE COURT OF COMMON PLEAS OF THE CITY AND COUNTY OF NEW YORK.

FILED OCTOBER 8, 1888.

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a *Papers on Appeal.*

Court of Appeals.

THE PEOPLE, on the Relation of the New York Electric Lines Company, Relator,
against
ROLLIN M. SQUIRE, as Commissioner of Public Works in and for the City and County of New York.

Jesse Larrabee, attorney for relator, 206 Broadway, New York city; David Leventritt, of counsel for relator, 320 & 322 Broadway, New York city.

1 *Notice of Motion for Mandamus.*

Court of Common Pleas for the City and County of New York.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of the New York Electric Lines Company,
against
ROLLIN M. SQUIRE, as Commissioner of Public Works in and for the City and County of New York.

SIRS: Take notice that upon the petition of the New York Electric Lines Company and the affidavit of Sidney F. Shelbourne, hereto annexed, I shall move this court, at a special term thereof to be held in the special term room of said court, at the county court-house in the city and county of New York, on the 26th day of August, 1886, at 11 o'clock in the morning of that day or as soon thereafter as counsel can be heard, for an order granting a writ of peremptory mandamus, addressed to Rollin M. Squire, as commissioner of public works in and for the city and county of New York, in accordance with the prayer of said petition.

Yours, &c., ROGER FOSTER,
Attorney for Petitioner, 206 and 208 Broadway, New York.

New York, August 25th, 1886.

To Rollin M. Squire, Esq., commissioner of public works in and for the city and county of New York; E. Henry Larcombe, Esq., counsel to the corporation.

2 *Petition.*

To the court of common pleas for the city and county of New York:

The petition of the New York Electric Lines Company respectfully shows to the court:

1. Your petitioner is a domestic corporation, organized under chapter 265 of the laws of 1848 as amended, and existing as such for the purpose of owning, constructing, and leasing lines of telegraph wires or other electrical conductors for telegraphic and telephonic communication and for electric illumination, to be placed under the pavements and sidewalks of the streets, avenues, and public highways of the cities of New York and Brooklyn, in the State

of New York, and with full powers to carry out said purposes under and by virtue of said chapter 265 of the laws of 1848 and chapter 397 of the laws of 1879, and the several acts amendatory of and supplemental to said acts, and with all the powers therein or otherwise given by law to corporations organized under said chapter 265 of the laws of 1848, but your petitioner has never operated or intended to operate electrical conductors, its intention having always been and still being to lease to other persons, natural or corporate, all of its electrical conductors, and not to operate itself any of such conductors or any other electrical conductors.

II. On or about the 16th day of April, 1883, your petitioner duly entered into a contract with the mayor, aldermen, and commonalty of the city of New York whereby, in consideration of the promise of your petitioner to comply with all the requirements, provisions, restrictions, conditions, and limitations contained in the ordinances of said municipality, set forth in Exhibits A and B, hereto annexed, said municipal corporation granted to your petitioner the franchise of laying wires or other conductors of electricity in and through the streets, avenues, and highways of New York city, and of making connections of such wires or conductors underground by
3 means of necessary vaults, test boxes, and distributing conduits, and thence above ground with points of electric illumination or of telegraphic or telephonic signal, as is set forth in Exhibit A, hereto annexed. Said contract is evidenced by the ordinances, resolutions, motions, and communications set forth in Exhibits A and B hereto annexed. Exhibit A is an extract from the minutes of the meeting of the board of aldermen of the city of New York, held on May 9th, 1883. The statements contained in said extract from said minutes and in the communication of your petitioner set forth in said extract are true. Exhibit B is a copy of the ordinance of the common council of the city of New York, approved by the mayor December 14th, 1878, which has been subsequently incorporated in sections 405, 406, 407, 408, 409, 410, and 411 of the ordinances of the mayor, aldermen, and commonalty of the city of New York, which were revised and adopted in the year 1880.

III. In pursuance of said contract and in reliance upon the faithful performance of the same by said municipal corporation and for the purpose of faithfully performing all of its own obligations thereunder and in partial performance thereof, your petitioner, on or about May 18th, 1883, duly filed in the office of the clerk of the county of New York a map, diagram, and tabular statement indicating the amount and position and localities of the spaces proposed to be occupied by your petitioner in and under the streets and other land in the city and county of New York, and thus, as petitioner claims, located, adopted, and appropriated by your petitioner said spaces in the exercise of the franchise granted to it as aforesaid and in the fulfillment of its terms and requirements, in accordance with the provisions of said revised ordinances of 1880, set forth in Exhibit B, hereto annexed; and your petitioner immediately proceeded to make ready its material and plant for the construction of its electrical conductors and underground lines in the city of New York, to de-

velop and elaborate its mechanical constructions for the same,
4 and made ready machinery and appliances and implements for its said works, in pursuance of the objects of its incorporation, at great expense to your petitioner. Your petitioner, since the said execution of said contract, has purchased and partly paid for and become obligated to pay the sum of fifty thousand dollars and upwards for property essential to the due performance of said contract, and more than three thousand shares of the capital stock of your petitioner, of the par value of one hundred dollars each, have been issued by your petitioner since the execution of said contract to persons who have purchased the same in reliance upon the said contract and franchise.

IV. The official volume containing the laws of this State purporting to have been passed during the year 1885 contains at page 852 what purports to be a law of this State, designated as chapter 499 of the laws of 1885, which is set forth in Exhibit C, hereto annexed. There is now on file in the office of the secretary of state for the State of New York what purports to be a law of this State, purporting to have been passed May 29th, 1886, which is set forth in Exhibit D, hereto annexed.

According to the last census there was but one city in the State of New York having a population exceeding five hundred thousand and less than one million; that was the city of Brooklyn. According to the last census there was but one city in the State of New York having a population exceeding one million; that was the city of New York. The bills of which Exhibits C and D are copies are both local bills, and each is repugnant to the constitution of this State, inasmuch as each embraces more than one subject. The title of neither of said bills expresses all the subjects therein contained.

Said bills are also repugnant to the constitution of this State because by section 2 of the bill, of which a copy is set forth in Exhibit C, it is sought to enact that chapter 534 of the laws of 1884 shall be applicable without inserting it in such a bill.

Upon information and belief, said belief being founded
5 upon the advice of counsel, your petitioner says that neither of said bills set forth in Exhibits C and D was intended to nor, if correctly construed, would operate upon your petitioner or its franchise or contract hereinbefore set forth. If, however, either of said bills should be so construed as to thus operate upon and affect the said franchise and contract of your petitioner and in any manner impair the rights thereby acquired by your petitioner, or to impose any conditions upon the exercise of such rights by your petitioner, such bill would be unconstitutional as a violation of the Constitution of the United States, because seeking to impair the obligation of a contract between your petitioner and the municipality of the city of New York and a contract between your petitioner and the people of the State of New York, and also as a violation of both the Constitution of the United States and the constitution of the State of New York, because seeking to take away the property of your petitioner without due process of law. Each of

said bills infringes in other respects the constitutions of the United States and of the State of New York.

V. In pretended compliance with and under color of the said bills set forth in Exhibits C and D, hereto annexed, Roswell P. Flower, Jacob Hess, and Theodore Moss assume to act as commissioners of electrical subways in and for the city and county of New York.

VI. Section 140 of the ordinances of the mayor, aldermen, and commonalty of the city of New York, which were revised in the year 1880, and are still in force, provides as follows:

"No pavement in any street of the city of New York which has been accepted by the corporation to be kept in repair at the public expense shall hereafter be taken up or the paving stones removed therefrom for any purpose whatever without the authority of the department of public works, under the penalty of one thousand dollars for every offense." The above-named Rollin M. Squire, as commissioner of public works in the city and county of New York, at the head of such department of public works, and his successor, if any, alone has the power to grant to your petitioner a
6 written permit to take up the pavements of the streets in the city of New York. Without such a written permit it will be impossible for your petitioner to lay its wires and other conductors of electricity and to make connections of the same, as it has the right to do by and under the said contract made between your petitioner and said municipality, and as it is necessary for the exercise of the said franchise which was granted to it by the common council of said city as aforesaid. Should your petitioner endeavor to lay its wires or electrical conductors under ground or make excavations for said purpose without such a written permit signed by said Squire, its employees thus engaged would be arrested by the police. Your petitioner, on or about the 21st day of July, 1886, requested said Squire for a permit and written authority to open the streets and remove the paving stones therefrom in the city and county of New York for the purpose of laying your petitioner's wires and other conductors of electricity and of making connections of the same, in accordance with the benefits and conditions of its said franchise. On or about the 23d day of August, 1886, said Squire refused to give your petitioner such a permit, resting his refusal upon the sole ground that your petitioner had not acquired the approval by said Flower, Hess, and Moss, in their alleged capacity as claimants to the alleged office of commissioners of electrical subways in the city and county of New York, of the plans and construction proposed by your petitioner.

It is the duty of said Squire, as commissioner as aforesaid, to grant such a permit to your petitioner.

VII. Your petitioner has no adequate remedy in the premises by an action at law or otherwise unless a writ of mandamus issue against said Squire, as commissioner as aforesaid, in accordance with the prayer of the petitioner.

Wherefore your petitioner prays that a writ of peremptory mandamus issue from this court directing the said Rollin M. Squire, as commissioner of public works in and for the city and county of

New York, and his successor, if any there be, to grant to your
7 petitioner a written permit and authority to make excavations in and open the streets and pavements in the city and county of New York for the purpose of laying its wires or other conductors of electricity in and through said streets, avenues, and highways, and of making connections of such wires or connections under ground, in accordance with the benefits and conditions of the franchise granted to your petitioner and the contract made with your petitioner by the mayor, aldermen, and commonalty of the city of New York, as has been hereinbefore set forth, and compelling said Squire, as commissioner, and his successor, if any, as aforesaid, to grant to your petitioner such other and further relief in the premises as to this court may seem just, together with the costs of this application.

Dated New York, August 25th, 1886.

[SEAL.] NEW YORK ELECTRIC LINES COMPANY,
By SIDNEY F. SHELBOURNE, *Its President.*

CITY AND COUNTY OF NEW YORK, *ss:*

Sidney F. Shelbourne, being duly sworn, deposes and says: The foregoing petition by the New York Electric Lines Company is true to my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true. The said petitioner is a domestic corporation and I am its president. I hereby incorporate the said petition into this my affidavit.

SIDNEY F. SHELBOURNE.

Sworn to before me this 21st day of September, 1886.
AUGUSTUS B. CARRINGTON,
Notary Public, N. Y. Co.

8 *Certificate of Incorporation.*

This is to certify that the undersigned have associated for the purpose of owning, constructing, using, maintaining, and leasing lines of telegraph wires or other electric conductors for telegraphic and telephonic communication and for electric illumination, to be placed under the pavements of the streets, avenues, and public highways of the cities of New York and Brooklyn, in the State of New York, and under the sidewalks of the streets and avenues of the said cities, and upon, over, or under private lands in the said cities, within blocks of buildings erected or to be erected therein, and for the purpose of owning franchises for laying and operating the said lines of electric conductors and the purchasing, owning, and disposing of such real estate within the said cities and such personal property as may from time to time be necessary and convenient to the building, using, maintaining, and leasing the said lines of electric conductors upon the terms and conditions and subject to the liabilities prescribed in the act of the Legislature of the State of New York, passed April 12th, 1848, entitled "An act to provide for the incorporation and regulation of telegraph companies," being chap-

ter 265 of the laws of 1848, and the several acts amendatory thereof and supplementary thereto, and in pursuance of the objects declared under authority of the act aforesaid the undersigned certify as follows:

First. The name assumed to distinguish such association and to be used in the transaction of its business and by which it may sue and be sued is the "New York Electric Lines Company."

Second. The general route of the said lines of electric conductors is, for the city of Brooklyn, commencing at or near the Fulton ferry, in said city, and extending north and eastward through the several streets and avenues thereof to Newtown creek and the boundary lines between the counties of Kings and Queens, and from the said commencing point to the several points in the boundary lines of said city eastward, southward, and westward to Bay Ridge and New York harbor, and, within the general limits described, to connect, by any and all streets and avenues, the several points with each other and with stations, central offices, and depots within the said city and the said stations, offices, and depots with public and private buildings, residences, and offices in the said city or with points of electric illumination or telegraphic or telephonic signal above the streets thereof.

Within the city and county of New York the general route of the said lines is, starting at or near the battery, to connect by the several streets leading north and northeastward with offices and depots at central points within the said city, and from these offices and depots to connect, by any and all the streets, avenues, and roads, with points in the northerly and easterly boundary lines of the said city and county of New York; generally, to wit, by Riverdale avenue and adjacent streets with Mount St. Vincent and by Broadway, McComb's Dam road, Central avenue, and adjacent channels of communication with the boundary line of the town or city of Yonkers and Woodlawn Heights, and through the various streets, avenues, and roads of Harlem, Morrisania, and Tremont with points on the Bronx river and the boundary of the county of Westchester; and, further, to connect the several offices, depots, and points within the outlying limits defined with each other and with public buildings and offices, and with private offices and residences within the said city and county of New York, and with points of electric illumination and telegraphic or telephonic signal above the streets and public highways thereof.

Third. The capital stock of such association is five million dollars, and the number of shares into which the said capital stock shall be divided is fifty thousand shares of the par value of one hundred dollars each.

Fourth. The names and places of residence of the shareholders and the number of shares held by each of them, respectively, is as follows:

Sidney F. Shelbourne, of New York city, N. Y., 18.	700 shares
George L. Weed, of the city of Brooklyn, N. Y.	1,000 shares
Herbert P. Brush, of the city of Brooklyn, N. Y. ----	100 shares
William Force Scott, of New York city, N. Y. --------	100 shares
Edward Barr, of the city of Brooklyn, N. Y. --------	100 shares

Fifth. The said association shall commence at and from the time of the filing of this certificate in the office of the clerk of the city and county of New York and of the filing of a copy of the same in the office of the secretary of state of the State of New York, and the termination of its existence shall be at the expiration of a period of one hundred years from its commencement.

Sixth. The capital stock of the association may be increased by a vote of the members owning and holding two-thirds of the stock thereof, or at any time after it shall have actually commenced the laying of wires under ground, by a three-fourths vote of its board of directors, duly chosen, to ten million dollars, and the number of shares thereof to one hundred thousand.

Seventh. The principal office of the said association shall be established in the city and county of New York.

In witness whereof we have hereunto respectively set our hands and seals and specified our respective residences.

SIDNEY F. SHELBOURNE, [L. S.]
New York, N. Y.
GEO. L. WEED, [L. S.]
Brooklyn, N. Y.
H. P. BRUSH, [L. S.]
Brooklyn, N. Y.
WM. FORCE SCOTT, [L. S.]
New York, N. Y.
EDWARD BARR, [L. S.]
Brooklyn, N. Y.

11 CITY AND COUNTY OF NEW YORK, *ss:*

Personally appeared before me this 14th day of October, 1882, Sidney F. Shelbourne, George L. Weed, Herbert P. Brush, William Force Scott, and Edward Barr, to me personally known and known to me to be the persons described in and who executed the within instrument, and severally acknowledged to me, each for himself, that they executed the same for the purposes therein expressed.

[L. S.] JOHN THEALL,
Notary Public, New York.

EXHIBIT A.

Motions and Resolutions Again Resumed.

Alderman Fitzpatrick moved that the communication from the N. Y. Electric Lines Company, dated April 16, 1883, accepting the grant from the city, presented in the board April 24, 1883, and ordered on file, be taken from on file and printed in full in the City Record and in the minutes.

The president put the question whether the board would agree with said motion.

Which was decided in the affirmative.

The said communication is as follows:

To the honorable the common council of the city of New York:

Whereas the honorable the board of aldermen, on March 13, 1883,

adopted the ordinance embracing the resolutions hereto annexed, marked A, granting to the New York Electric Lines Company a franchise to lay wires and other electric conductors under the streets of New York city; and

Whereas the said board, on April 10, 1883, reconsidered the
12 said ordinance and again adopted the same, notwithstanding the objections of his honor the mayor; and

Whereas the said ordinance embraces in its resolutions certain requirements, provisions, restrictions, conditions, limitations, and extensions not provided in the general ordinance of the common council, approved December 14, 1878, under which the franchise granted by the ordinance aforesaid, hereto annexed, is to be enjoyed and exercised by the said New York Electric Lines Company:

Now, therefore, the said New York Electric Lines Company by these presents accepts the said franchise as contained in the ordinance and resolutions adopted by the honorable the board of aldermen April 10, 1883, and agrees to, assumes, and obligates itself in the observance of all the requirements, provisions, restrictions, conditions, and limitations contained in the said last-mentioned ordinance as adopted April 10, 1883, as well also as to the provisions, conditions, and obligations of the said general ordinance approved by the mayor December 14, 1878.

In witness whereof the said New York Electric Lines Company has caused its corporate name to be signed hereto by its president, duly authorized thereto, and its corporate seal to be hereto affixed by its secretary, thereto duly authorized, this sixteenth day of April, A. D. 1883, at the city of New York.

[L. S.] NEW YORK ELECTRIC LINES COMPANY,
By SIDNEY F. SHELBOURNE,
President.

Attest: H. P. BRUSH, *Sec'y.*

A.

Resolved, That permission be, and hereby is, granted to the New York Electric Lines Company to lay wires or other conductors of electricity in and through the streets, avenues, and highways
13 of New York city, and to make connections of such wires or conductors under ground by means of the necessary vaults, test boxes, and distributing conduits, and thence above ground with points of electric illumination or of telegraphic or telephonic signal, in accordance with the provisions of an "Ordinance to regulate the laying of subterranean telegraph wires and electric conductors in the streets of the city," passed by the common council and approved by the mayor December 14, 1878: Provided, however, and it is hereby ordained and

Resolved, That whenever the said New York Electric Lines Company, in the progress of laying its lines of electric conductors, shall be prevented or obstructed from placing its wires in the spaces which may have been generally selected under the ordinance passed and approved as aforesaid by man-holes of sewer, gas, steam, or water-

mains or other underground or pavement impediments now and heretofore existing, then and in such cases the said company may, under the privileges hereby granted, vary the space selected by adopting, appropriating, and using equivalent and nearest practicable spaces as may be found necessary; and provided further, and it is hereby further

Resolved and ordained, That the connection vaults or test boxes aforementioned may be extended under ground not more than four feet in depth or two feet in any lateral direction beyond the limited spaces contemplated for the lines of wires in the ordinance passed and approved as aforesaid, and may be fitted with covers or other means of access at the level of the pavements of the several streets and avenues.

Resolved, That in addition to the requirements and provisions to be observed, contained in the said ordinance, the said New York Electric Lines Company, as a further compensation for the opening and use of the streets of the city, shall pay into the city treasury, within ten days after taking up the pavements, for each one thousand feet in length of trench to be excavated, the maximum sum or sums of money which have been or which may hereafter be required of grantees or licensees to be paid under any general or special
11 ordinance of the common council heretofore enacted, authorizing the laying of electric conductors under the streets of the city.

Resolved, That the permission to the said New York Electric Lines Company hereby intended by the common council is conditioned that the said company shall not transfer or dispose of the franchise hereby granted without the further authority of the common council, and that it will make no discrimination of individuals or corporations in the rental and use of its lines of wires which may be laid down hereunder.

Resolved, That the city shall have the option, after the first day of January, 1885, to require that the said New York Electric Lines Company shall pay into the city treasury two per cent. of its gross receipts derived from the rental of its wires under the franchise hereby granted, in lieu of the donation to the city of the two wires in each line of conductors, as provided in the general ordinance passed and approved as aforesaid, and said option may be declared at any time after the said first day of January, 1885, by resolution of the common council.

Attest:

[L. S.] SIDNEY F. SHELBOURNE, *President.*

EXHIBIT B.

No telegraph line or electric conductor shall be laid under the streets of this city at such depth from the surface that the necessary excavation incident to laying or repairing the same shall expose or endanger any water or gas pipes, sewers, or drains, or any parts thereof.

Such wires or conductors shall in no case be placed at a greater distance from the curbstone separating sidewalks from carriage-way

than four feet, except in crossing streets running transverse to the direction of said lines, when such crossing shall be made in
15 the shortest straight line or in making necessary connections with buildings and stations.

The method employed in laying said conductors shall be such that it will at no time be necessary to remove so much of the pavement or to make such excavation as to materially impede traffic or passage upon sidewalks or streets during operation of laying or repairing said conductors, except when in crossing streets transversely, where it shall be permitted to remove the paving stone for a width not exceeding two feet, and in the nearest straight line from corner to corner. In no case during the general hours of passage and traffic shall passage be interrupted thereby for a longer period than one hour.

The work of removal and replacement of the pavements in any and all of the streets, avenues, highways, and public places in and through which the wires of any telegraph company shall be laid shall be subject to the control and supervision of the commissioner of public works. Excavations in any and all of the unopened streets, avenues, highways, or public places shall also be subject to like control and supervision.

The space selected for placing said wires, in every case being limited as to direction and general position by the foregoing provisions, shall not exceed two feet in width by two feet in depth.

Grantees under this ordinance shall be required within six months after such permission shall be granted to file with the county clerk maps, diagrams, and tabular statements, including the amount and position of the spaces proposed to be occupied by them, and their rights and privileges under this ordinance shall be confined to the spaces, positions, and localities as indicated by said maps, diagrams, and statements.

Whenever routes of several wires shall be laid by and under the provisions of this ordinance, that one wire in each route shall be reserved for the use of the police and one for the fire-alarm telegraph, and the use of same shall be donated to the city and county of New York by the parties laying such lines or wires free of any price or charge therefor.

16

Exhibit C.

An act providing for placing electrical conductors under ground in cities of this State and for commissioners of electrical subways, passed June 13, 1885, three-fifths being present.

The people of the State of New York, represented in senate and assembly, do enact as follows:

Sec. 1. Within twenty days after the passage of this act, in any city of this State having, according to the last census, a population exceeding five hundred thousand and less than one million, the mayor of such city is hereby authorized and directed to appoint, and in cities having a population exceeding one million the mayor, comptroller, and commissioner of public works of such cities are

hereby authorized and directed to appoint, three disinterested persons, residents of the respective cities for which they shall be appointed, to be a board of commissioners of electrical subways. Such board shall meet as soon as practicable after such appointment and shall then organize by the election from their number of a president and a secretary of the board. The board shall give at least ten days' notice in a daily paper published in such city of the time and place of such meeting.

SEC. 2. The said board of commissioners is hereby charged with the responsibility of enforcing the provisions of an act entitled "An act in relation to telegraph and electric light companies in the cities of this State," passed June 14, 1884, as amended; and the said act is hereby amended and made to conform in all respects to the provisions of this act, and it is hereby made the duty of said board of commissioners to cause to be removed from the surface and put, maintained, and operated underground, wherever practicable, all electrical wires or cables used or to be used in the business of any such company in any street, avenue, or other highway in any such city, so as to enable and require all duly authorized com-
17 panies operating or intending to operate electrical conductors in any street, avenue, or highway of any such city as is or shall be affected by the provisions of said act to transact their business with underground conductors wherever practicable.

SEC. 3. When any company, operating or intending to operate electrical conductors in any such city, shall desire or be required to place its conductors, or any of them, underground in any of the streets, avenues, or other highways of such city, and for that purpose to remove the same from the surface thereof, and shall have been duly authorized to do so, it shall be obligatory upon such company to file with said board of commissioners a map or maps, made to scale, showing the streets or avenues or other highways which are desired to be used for such purpose, and giving the general location, dimension, and course of the underground conduits desired to be constructed. Before any such conduits shall be constructed it shall be necessary to obtain the approval by said board of said plan of construction so proposed by such company; and said board has and shall have power to require that the work of removal and of constructing every such system of underground conductors shall be done according to such plan so approved, subject at all times to such modification as shall from time to time by the board be made, and subject also to the rules and regulations, not inconsistent herewith, prescribed or to be prescribed by the local authorities having control of such streets, avenues, or other highways of such city.

SEC. 4. It shall be the duty of said board of commissioners to carefully investigate any and all methods proposed by any such company for electric lighting or electrical communication by the use of conductors along or across any street, avenue, or other highway in any such city; and, before approving of any such method, said board of commissioners shall require that, so far as practicable, all such conductors when constructed shall be underground; provided no suitable plan is proposed or in use, within sixty days after the

passage of this act, it shall be the duty of such board
18 to cause to be devised and made ready for use such a general plan as will meet the requirements of said act and of this act, and the board shall have full authority to compel all companies operating electric wires to use such subway, so prepared in accordance with the provisions of this act. Wherever, in the suburbs or along the streets, avenues, or other highways in sparsely inhabited or unoccupied portions of any such city, the public interests do not require the electrical conductors to be placed underground, and wherever, in any other locality of any such city, it is deemed by said board to be, for any cause, impracticable to construct and successfully operate underground the electrical conductors required by any such company, then, and in either of those cases, it shall be the duty of said board of commissioners to examine and grant the application of any such company for permission to deviate therefrom an underground system; but the board shall not grant any such permission unless the board shall be satisfied, upon investigation, that such a permit should, and for one or the other of the reasons hereinbefore stated, be in such case granted, and that it will not interfere with the successful working of underground conductors elsewhere in such city. Any such permit shall be held and construed to authorize the construction and maintenance of the lines of conductors therein provided for, as and where prescribed by the board. It is hereby made the duty of said board of commissioners, in granting any such permit for other than underground electrical connections, to bear in mind the policy and purpose of this act, which is to convert the overhead systems of electrical wires and cables now in use in said cities to underground systems as soon as possible without impairing the efficacy of their service; to require that, as far as practicable, all electrical conductors in any street, avenue, or other highway of any such city shall be removed from the surface and placed and operated underground, as soon as may be consistent with the convenient use thereof by the public; and that it is intended hereby to authorize other than underground electri-
cal conductors, to be used in the streets, avenues, or other
19 highways of any such city, only when and where the public interests do not require the electrical conductors to be placed underground, or when and where it shall be deemed by the board itself to be impracticable to place and operate the conductors advantageously underground as aforesaid, and that it is hereby intended to make all aerial or other electrical connections incidental only to such underground methods and to require that they be authorized only when and where needed for the convenient use of the public or where the underground conductors can be made thereby more useful. The work of constructing every line of conductors authorized by any such permit so granted shall be subject to the rules and regulations not inconsistent herewith, prescribed or to be prescribed by the local authorities having control of such streets, avenues, and other highways in such city. Every such permit shall specify the location of the structures to be erected and to be used for sustaining the electrical conductors and shall give the general di-

mensions thereof, and a copy of every such permit shall be filed by said board of commissioners in the office of the mayor of such city to which it relates and shall be recorded there in a book to be provided and kept for that purpose, which shall be at all times accessible to the public. It shall be the duty of said board in devising the aforesaid plan so to devise the same that the subway may be used by any such city for the electric wires or conductors operated by its police, fire, or other departments without expense, except the expense of the wires or conductors, but no such city shall be compelled to place any such wires or conductors underground until the money has been specifically raised therefor by the proper authorities, and until that time any such city may continue to use and extend such wires in the same manner as though this act and the act referred to in the second section of this act had not been passed.

SEC. 5. Whenever said board of commissioners, in carrying out the provisions of said act, shall permit any aerial electrical wires or cables to be carried along or across and above the surface of any of the streets, avenues, or other highways of any such city to be crossed by aerial electrical wires or cables, it shall be the duty of the board to designate also, in such permit, the route and location thereof and to prescribe and regulate the height at which such wires or cables shall be placed, and it is hereby expressly provided that when any such permit shall be granted by said board of commissioners in extending the connections of any subterranean electrical conductors for the erection of any structure or structures for sustaining electrical conductors above the surface of any highway, or for placing wires or cables on any such structure or elsewhere than underground, or for carrying any such wires or cables across or along and above the surface of any highway or over or into or in the rear of any building or block in any such city, any and all such structures and any and all such wires or cables shall be so erected and maintained as not to incommode the other public uses of such streets, avenues, or other highways.

SEC. 6. The term of office of said commissioners shall expire on the first day of November, 1887, or sooner upon the performance of their functions as herein prescribed. Each of the commissioners so to be appointed and each of his successors in office is and shall be removable for cause, but only upon notice and after an opportunity to be heard by the Governor of this State, who has and shall have power to fill any and all vacancies, however caused, in the office of either of the commissioners hereabove named.

SEC. 7. The salary of each of said commissioners and of every successor of either of them, if appointed for either of such cities having a population of more than one million, shall be five thousand dollars per annum, and if appointed for either of such cities having a population of less than one million shall be three thousand dollars per annum, payable quarterly by the comptroller of this State, who shall also audit and pay quarterly all necessary and incidental expenses of each of such boards of commissioners. The amount of such salaries and expenses shall be by the comptroller assessed upon and collected from the several com-

panies operating electrical conductors in any such city of the State which under the provision of said act are or shall be required to place and operate any of their conductors underground, and the amount of any such assessment shall be paid by the company upon which it is so assessed to the comptroller in installments quarterly or oftener, as and when required by him.

SEC. 8. It shall be the duty of every such company to furnish the comptroller, from time to time, as and when requested, all data by him desired, to enable him to apportion the relative share to be paid by each such company of the expenses of said board and of the salaries of said two commissioners, such estimate to be by the comptroller made with reference to the number of miles of wire operated within the limits of any such city, and the several companies interested to be by the comptroller assessed ratably according to the number of miles of such wires, which the comptroller shall certify to be operated by them respectively.

SEC. 9. All maps, books, and papers of said board of commissioners relative to electrical conductors in any such city shall, at the expiration of the term of office of such commissioners, be filed in the office of the mayor of such city, and shall be there kept at all times accessible to the public.

SEC. 10. All acts and parts of acts inconsistent herewith are hereby repealed.

SEC. 11. This act shall take effect immediately.

22

EXHIBIT D.

CHAPTER 563.

AN ACT to amend chapter four hundred and ninety-nine of the laws of eighteen hundred and eighty-five, entitled "An act providing for placing electrical conductors underground in cities of this State, and for commissioners of electrical subways."

Passed May 29, 1886, three-fifths being present.

The people of the State of New York represented in senate and assembly do enact as follows:

SEC. 1. Section seven of chapter four hundred and ninety-nine of the laws of eighteen hundred and eighty-five, entitled "An act providing for placing electrical conductors underground in cities of this State, and for commissioners of electrical subways," is hereby amended so as to read as follows:

SEC. 7. The salary of each of said commissioners, and of every successor of either of them, if appointed for either of such cities having a population of more than one million, shall be five thousand dollars per annum, and if appointed for either of such cities having a population of less than one million, shall be three thousand dollars per annum, payable quarterly by the comptroller of this State, who shall also audit and pay quarterly all necessary and incidental expenses of each of such boards of commissioners. The amount of such salaries and expenses shall, in such proportion as is prescribed in section eight of this act, be by the comptroller assessed

upon and collected from the several companies operating electrical conductors in any such city of the State which, under the provisions of this act, are or shall be required to place and operate any of their conductors underground, and shall be paid into the treasury of the State in such installments as the comptroller shall require.

23 SEC. 2. Section eight of said chapter four hundred and ninety-nine of the laws of eighteen hundred and eighty-five is hereby amended so as to read as follows:

SEC. 8. It shall be the duty of every such company to furnish the comptroller from time to time, as and when requested, all data by him desired to enable him to apportion the relative share to be paid by each such company, of the expenses of said boards, and of the salaries of said commissioners; such apportionment to be by the comptroller made with reference to the number of miles of wires operated within the limits of any such city, and the several companies which are or shall be required under the provisions of this act to place and operate any of the conductors underground shall be by the comptroller assessed ratably according to the number of miles of such wires which the comptroller shall certify to be operated by them respectively; and the said commissioners shall furnish the comptroller with a list of such companies. Whenever any such company shall neglect or refuse to furnish such data within twenty days after being so requested by the comptroller, the comptroller is hereby authorized to determine from the best information he shall be able to obtain and to certify the number of miles of wires so operated.

SEC. 3. Section eleven of said chapter four hundred and ninety-nine of the laws of eighteen hundred and eighty-five is hereby amended so as to read as follows:

SEC. 11. Whenever any company shall neglect or refuse to pay the assessment made upon such company pursuant to the provisions of this act within thirty days after being notified by the comptroller of the amount thereof, it shall be lawful for the comptroller to issue his warrant or warrants under his hand and seal of office, directed to the sheriff of any county in this State, commanding him to levy upon and sell the goods and chattels, lands and tenements, of the said company found within the said county for the payment of the amount of said assessment, together with interest thereon and cost of executing such warrant, and to return the said warrant

24 to the comptroller and pay to the State treasurer the money which shall be collected by virtue thereof by a certain time therein to be specified, not less than sixty days from the date of such warrant. Such warrant shall be a lien upon and shall bind the personal estate of the company against which it shall be issued from the time an actual levy shall be made by virtue thereof, and the sheriff to whom such warrant shall be directed shall proceed upon the same in all respects with the like effect and in the same manner as prescribed by law in respect to executions issued against property upon judgments rendered by a court of record, and shall be entitled to the same fees and costs for his services in executing the same, to be collected in the same manner.

SEC. 4. This act shall take effect immediately.

25

Order Denying Motion.

At a special term of the court of common pleas for the city and county of New York, held in the county court-house, in the city and county of New York, on the 22d day of October, 1886.

Present: Honorable Henry Wilder Allen, judge.

THE PEOPLE OF THE STATE OF NEW YORK, on the Relation of the New York Electric Lines Company,

against

ROLLIN M. SQUIRE, as Commissioner of Public Works in and for the City and County of New York.

Upon reading and filing the notice of motion for an order granting a writ of peremptory mandamus, addressed to the above-named respondent, and the petition of the New York Electric Lines Company thereto annexed, verified by the affidavit of Sidney F. Shelbourne, on the 21st day of September, 1886, and upon the certificate of incorporation of the relator above named, and after hearing Roger Foster, Esq., of counsel for the New York Electric Lines Company, in support of said motion, and E. Henry Lacombe, Esq., counsel to the corporation, in opposition thereto, and Daniel L. Gibbens, Esq., counsel for the subway commission, as *amicus curiæ*, it is ordered that said motion be, and the same hereby is, denied, on the grounds stated in the opinion and not as a matter of discretion.

Enter—

H. W. A., *J. C. P.*

26

Court of Common Pleas, Special Term.

Filed Sept. 7, 1886.

THE PEOPLE, on the Relation of The New York Electric Lines Company,

against

ROLLIN M. SQUIRE, as Commissioner of Public Works.

Mr. Roger Foster, for the relator; Mr. E. H. Lacombe, counsel to the corporation, for the commissioner of public works; Mr. D. L. Gibbens, for the subway commissioners.

ALLEN, *J.*:

The relator is a domestic corporation organized under chapter 265 of the laws of 1848, as amended, for the purpose of owning, constructing, using, maintaining, and leasing lines of telegraph wires or other electric illumination to be placed under the pavements of the streets, avenues, and public highways of the cities of New York and Brooklyn, in the State of New York.

In the month of April, 1883, the relator obtained from the common council of the city of New York permission to lay its wires or other conductors of electricity in and through the streets, avenues, and highways of said city and to make connections with such wires or conductors under ground by means of the necessary vaults, test boxes, and distributing conduits. This permission was granted pursuant to chapter 397 of the laws of 1879, as amended by the

laws of 1881, chapter 483, which provides that a company or companies organized or incorporated under the laws of this State
27 for the purpose of owning, constructing, using, and maintaining a line or lines of electric telegraph within this State or partly within or partly beyond the limits of this State are authorized from time to time to construct and lay lines of electrical conductors underground in any city, village, or town within the limits of this State, subject to all the provisions of law in reference to such companies not inconsistent with this act: Provided, That such company shall, before laying any such line in any city, village, or town of this State, first obtain from the common council of cities, the trustees of villages, or the commissioners of highways of towns permission to use the streets within such city, village, or town for the purpose therein set forth.

The said relator accepted such privilege upon the conditions and terms imposed by the common council in granting the same.

In June, 1884 (laws of 1884, chapter 534), an act in relation to telegraph and electric light companies in the cities of this State was passed, which directed that all telegraph, telephonic, and electric light wires and cables used in any incorporated city of this State having a population of five hundred thousand or over should thereafter be placed under the surface of the streets, lanes, and avenues of said city and requiring the same to be removed from the surface of the streets or avenues before the first day of November, 1885, and in case of failure to comply with the provisions of the act within the time specified the local governments of said cities were directed to remove without delay all telegraph, electric light, and such other wires, cables, and poles wherever found above ground within the corporate limits of their respective cities.

In June, 1885, an act providing for placing electrical conductors under ground in cities of this State and for commissioners of electrical subways was passed by the Legislature, which required that within twenty days after the passage of this act in any city of the State having a population exceeding five hundred thousand
28 and less than one million the mayor of such city is authorized and directed to appoint and in cities having a population exceeding one million the mayor, comptroller, and commissioner of public works are authorized and directed to appoint three disinterested persons to be a board of commissioners of electrical subways. Said board is charged with the responsibility of enforcing the provisions of the act of June 14, 1884, above mentioned as amended, and said act was thereby amended and made to conform in all respects to the provisions of this act. It was made the duty of said board to cause to be removed from the surface and put, maintained, and operated under ground whenever practical all electrical wires or cables used or to be used in the business of any such company in any street or avenue in any such city, so as to enable and require all duly authorized companies operating or intending to operate electrical conductors in the streets or avenues of any such city as is or shall be affected by the provisions of said act to transact their business with underground conductors whenever practicable.

Section 3 of said act provides that when any company operating or intending to operate electrical conductors in any such city shall desire or be required to place its conductors or any of them underground in any of the streets, avenues, or highways of such city it shall be obligatory upon such company to file with the said board of commissioners a map or maps made to scale, showing the streets or avenues or other highways which are desired to be used for such purpose, and a general location, dimensions, and costs of the underground conduits desired to be constructed.

Before any such conduits shall be constructed it shall be necessary to obtain the approval of said board of such plans of construction so proposed by such company, and said board has and shall have power to require that the work of removal or constructing every such system of underground conductors shall be done according to such plans so approved.

Section 4 provides that it shall be the duty of the said board to carefully investigate any and all methods proposed by any such company for electric lighting or electrical communication by the use of conductors along or across any street, avenue, or any other highway in said city; and before approving of any such method the board of commissioners shall require that, so far as practicable, all such conductors when constructed shall be underground. The section further provides that in case no suitable plan is proposed or in use within sixty days after the passage of the act, it shall be the duty of such board to cause to be devised and made ready for use such a general plan as will meet the requirements of said act and of this act, and that the board shall have full authority to compel all companies operating electric wires to use such subway so prepared in accordance with the provisions of this act.

The relator has made application to the commissioner of public works for leave to make excavations in the streets of this city so as to construct its line of subterranean electrical wires. The commissioner of public works has refused such permission on the ground that the plan of the relator has not been approved by the board of subway commissioners, in accordance with section 3 of the act of June, 1885.

The relator claims the right to such permit under the franchise granted to it by the common council in 1883, and contends—

1. That chapter 499 of the laws of 1885 does not apply to it because it has never operated or never intends to operate electric wires; that the purpose of the relator is to lease its wires and not to operate them.

2. That chapter 499 of the laws of 1885, if applicable to the relator, would be unconstitutional as impairing the obligations of contracts.

3. That said chapter is unconstitutional because it is a local bill embracing more than one subject.

4. That it is unconstitutional because it enacts that an existing law shall be applicable and is not inserted in it.

5. That said act is unconstitutional because it compels the telegraph companies to pay the expenses of the subway com-

mission and the expense of constructing the subway the said commission may build.

It is my opinion that chapter 499 of the laws of 1885 applies to the relator. That chapter must be read in connection with chapter 534 of the laws of 1884, for the reason that the act of 1885 requires the board of subway commissioners therein created to enforce the provisions of the act of 1884, and declares that that act is so amended as to conform in all respects to the provisions of the act of 1885. The act of 1884 requires that all telegraph, telephone, and electric light wires and cables used in any incorporated city of this State having a population of five hundred thousand or over should thereafter be placed under the surface of the streets, lanes, and avenues of said city. This portion of the act of 1884 has not been repealed and plainly declares the intention of the Legislature that all electrical wires and cables shall be placed under ground. It therefore seems to me that the Legislature intended that the subway commissioners should have jurisdiction over the laying of all electric wires and cables and of all companies using or intending to use underground wires through the streets, and authorized them to require conformity to plans approved by them.

The relator next claims that the act of 1885 is violative of the constitution as impairing the obligation of contracts and taking away property without due process of law. It contends that the grant to it by the common council having been accepted by it became vested with the qualities of contract. This is true. The power of the Legislature in directing the use of public streets is without limit, and instead of exercising the power directly it may authorize it to be exercised by the local authorities. Any privilege granted authorizing encroachments upon the public streets until it has been accepted and acted upon is a mere revokable license and may be recalled at pleasure; but after it has been accepted and acted upon it becomes a contract within the meaning of the clause of the Constitution which secures the inviolability of contracts, by
31 declaring that no State shall pass any laws impairing their obligations. This principle was incorporated into our law by Dartmouth College case. Therefore any law which takes away or materially alters the charter of any private corporation is unconstitutional, unless the power to alter was reserved when the grant was made.

I do not think that chapter 499 of the laws of 1885 takes away or materially alters or impairs the rights which the relator possessed by way of franchise prior to the passage of said act.

This act does not take away the relator's franchise, but simply regulates its use. The regulation in this act, which prescribes that the electrical subways shall be constructed according to a plan to be approved by the commissioners, is an exercise of the police power of the State. Such provisions of law which relate to the safety, comfort, health, convenience, good order, and general welfare of the community are styled police laws or regulations; and it is well settled that laws or regulations of this character, though they may disturb the enjoyment of individual rights, are not unconstitutional,

though no provision is made for compensation for such disturbances. They do not appropriate private property, but simply regulate its use and enjoyment. All property is held subject to the proper exercise of this power, either by the Legislature or by municipal corporations to which the Legislature may delegate it. Although the citizen owns his property absolutely, he owns it subject to this restriction, that the sovereign power may so direct the use of it that it shall not interfere with the safety, comfort, health, and the convenience of others.

The similar exercise of the police power is found in the acts relating to the construction of buildings, in which it is provided that no building shall be erected or altered until specifications and plans shall have been submitted to and approved by the inspector of buildings.

That a statute impairs the value of property does not make
32 it unconstitutional. All property is held subject to the power of the State to regulate and control its use in the interest of the public welfare.

In Thorpe *vs.* R. and B. R. R. Co., 77 Vermont, 140, Judge Redfield says: "By this general police power of the State persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the State; of the perfect right of the Legislature to which no question ever was or, upon acknowledged authority, can be made."

Ch. J. Waite, in delivering the opinion of the Court in Mann *vs.* The State of Illinois, says: "When one devotes his property to a use in which the public have an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has thus created." The reports abound in decisions which show that the State has authority to regulate the use and enjoyment of property and the control of private business in many ways without coming in conflict with any of those constitutional principles which are established for the protection of private rights and private property. It is my opinion, therefore, that the regulation in regard to subways for electric wires and cables in the large cities referred to in the act of 1885 was a lawful exercise of the police power of the Legislature.

It is to be noticed that it does not appear that the relator ever filed with the board of commissioners of subways any maps or plan pursuant to the act of 1885, or ever sought to obtain the approval of said board of any plans of construction proposed by it, or if any such plans were filed it does not appear that the board carefully investigated such plans, as required by section 4 of the act of 1885. On the other hand, it appears that the relator sought to convince the commissioners, and did convince them, that chapter 499 of the laws of 1885 did not apply to it. Whatever injury the relator may have suffered from a failure to submit its plans to the board of commissioners or from the failure of the board of commissioners to
33 carefully investigate any such plans, if plans were submitted, is not attributable to the act of 1885.

The act of 1885 is not, in my opinion, obnoxious to any of the constitutional objections which have been raised by the relator. It is not violative of section 16 of article 3 of the constitution of this State, which provides that no private or local bill which may be passed by the Legislature shall embrace more than one subject, and that shall be expressed in its title. This is not a local bill within the law, as laid down by the decisions in this State, and by which I must be controlled. It is contended that it is a local bill, because its operation is confined to cities having a certain population by the last census, there being but two such cities—New York and Brooklyn. This question has received judicial interpretation in this State in the "Matter of the New York Elevated Railroad Company, 70 N. Y., 327, and in the matter of Church, 92 N. Y., p. 1."

In the matter of Church the act of the Legislature which came under review was one giving certain powers to the board of supervisors in any county containing an incorporated city of over one hundred thousand inhabitants, where contiguous territory in a county has been mapped out in streets and avenues. This act was held not to be a local law in the meaning of the State constitution, and so not violative of the constitutional provision above referred to. The court says:

"The class consists of every county in the State having within its boundaries a city of one hundred thousand inhabitants and territory beyond the city limits mapped into streets and avenues. How many such counties there are now or may be in the future we do not know, and it is not material that we should. Whether many or few, the law operates upon them all alike, and reaches them, not by a separate selection of one or more, but through the general class of which they are individual elements. The force of the law of 1881 is not localized in Kings county and confined to its territory. By
34 its terms it applies equally to every other county which may prove to be within the constituted class. It is said there is but one such county; and so it was said there was but one elevated railroad. Neither fact at all narrowed the terms of the law. Those terms in each case were broad enough to cover every county in the State if it had the required city and mapped territory on the one hand or its own elevated railroad on the other."

In the matter of the New York Elevated Railroad Company the court construed the provisions of the rapid transit act authorizing the elevated railroads to make certain connection with other roads. It was claimed that there was but one elevated railway in operation at the time of the passage of the act, and hence it must be deemed that the Legislature had sole reference to that, and that the act was a local act. It was held by the court that it was not a local or private bill, and so not violative of the constitutional provision referred to. Every intendment is in favor of the constitutionality of an act of the Legislature. It is not to be presumed or inferred that the Legislature intended to violate or evade the constitutional restraints, and the courts cannot take proofs of facts *aliunde* for the purpose of showing a statute, valid and regular upon its face, to be unconstitutional.

I have not overlooked the decisions in the States of Ohio and Illi-

nois to which attention has been called in the argument of the learned counsel for the relator. Those decisions are in conflict with the cases in this State, but my decision must be governed by the law as settled in our own courts. Further, I do not think that under a proper rule of construction the act referred to embraces more than one subject, and that is sufficiently expressed in its title. The act embraces but one subject, which is the placing of electrical conductors under ground, and the mode of carrying that purpose into effect.

Brewster *et als. vs.* City of Syracuse, 19 N. Y., 116.

Sun Mutual Insurance Company *vs.* The Mayor, 8 N. Y., 241.

35 The object of the provision of the constitution above referred to was to prevent the uniting of various objects having no necessary or natural connection with each other in one bill and to prevent members of the Legislature and the public from being misled by the title. I think this act is addressed to a single subject, and that is expressed in its title. The mode in which the subject is treated or the manner in which the purpose of the statute is to be carried out could not and need not be stated in the title, according to the letter and spirit of the constitution.

The relator's second objection is that the act of 1885 is violative of section 17 of article 3 of the constitution, which declares that no act shall be passed which shall provide that any existing law or any part thereof shall be made or deemed a part of said act, or which shall enact that any existing law or any part thereof shall be applicable, except by inserting the same in such act.

I do not think this objection available to the relator.

By referring to section 2 of the act of 1885 it will be seen that it is therein provided that the act of 1884 "is amended and made to conform in all respects to the provisions of this act." This is clearly not within the inhibition of the section referred to. The act is amended so as to conform to the act of 1885.

No express provision was necessary for that purpose, and the effect would have been the same if that part of the section had been wholly omitted. By the effect of the repealing clause in the act of 1885 the act of 1884 is repealed so far as its provisions are inconsistent with the act of 1885, but is not repealed as to such of its provisions as are not inconsistent with it. This section of the constitution does not require that an act amending a former one shall contain the whole of such prior act.

Wells *vs.* City of Buffalo, 14 Hun., 438.

To be violative of this section the new act must, by its express terms, provide that an existing law shall be made or deemed part of it or made applicable. This is not done when the new act
36 merely declares that it amends the former one so that it may conform to such new act.

The last objection of the relator is that the act imposes upon the telegraph companies operating in this city the expenses of the subway commission, and also the expense of the construction of their subway.

This objection presents no difficulty. The rule gathered from

numerous cases may be stated to be that "if when any invalid provision of an act is stricken out that which remains is complete in itself and is capable of being executed in accordance with the apparent legislative intent, wholly independent of that which is rejected, the act must be sustained." Applying this principle to this act, it seems clear that if this provision is defective it would not invalidate the rest of the act. This clause may be discarded without at all changing the scope and purpose of the act of defeating its obvious intention and aim.

The general purpose remains and is complete, effective, and operative after this provision is rejected. There is nothing in that provision so connected in subject-matter, meaning, or purpose with the main scope of the act as to indicate that the Legislature would not have passed the latter without the former.

See People *vs.* Briggs, 50 N. Y., 553.
In the Matter of Middletown, 82 N. Y., 196.

The conclusion arrived at is that the commissioner of public works was correct in his refusal to allow a permit to the relator to open the streets for the purpose of laying its wires on the ground that its plans had not been approved by the board of subway commissioners, as required by section 3 of the act of June 13, 1885.

It therefore follows that the application for a mandamus must be denied.

37 Court of Common Pleas for the City and County of New York.

THE PEOPLE OF THE STATE OF NEW YORK, on the Relation of the New York Electric Lines Company,
against
ROLLIN M. SQUIRE, as Commissioner of Public Works in and for the City and County of New York.

SIRS: Take notice that the above-named plaintiff hereby appeals to the general term of this court from the order of the special term thereof, dated and entered on October 22, 1886, denying the application for a writ of peremptory mandamus, addressed to Rollin M. Squire, as commissioner of public works in and for the city and county of New York, and from each and every part of said order.

Yours, &c.,
ROGER FOSTER,
Plaintiff's Attorney, 206 & 208 *Broadway, New York.*

Dated New York, October 22, 1886.

To E. Henry Lacombe, Esq., counsel to the corporation; Nathaniel Jarvis, Jr., Esq., clerk of the court of common pleas for the city and county of New York.

38 At a general term of the court of common pleas for the city and county of New York held in the county court-house, in the city of New York, on the 7th day of February, 1887.

Present: Hon. Richard L. Larremore, presiding justice; Hon. Joseph F. Daly, Hon. Henry W. Bookstaver, justices.

THE PEOPLE, on the Relation of the New York Electric Lines Company,
against
ROLLIN M. SQUIRE, as Commissioner of Public Works, &c.

The appeal from an order in this proceeding made at a special term of this court on the 22d day of October, 1886, denying the relator's motion for a peremptory mandamus having been duly brought on for hearing, and after hearing counsel for the respective parties, it is ordered that the said order so appealed from be in all things affirmed, on legal grounds only, for the reasons stated in the order appealed from.

Enter—

H. W. B., *J. C. P.*

39 Court of Common Pleas for the City and County of New York.

THE PEOPLE OF THE STATE OF NEW YORK, on the Relation of the New York Electric Lines Company,
against
ROLLIN M. SQUIRE, as Commissioner of Public Works, &c.

Please take notice that the above-named relator, The New York Electric Lines Company, appeals to the court of appeals from the order of the general term of this court bearing date the 7th day of February, 1887, and entered in the office of the clerk of said court the 28th day of April, 1887, affirming the orders of the special term thereof, entered the 22d day of October, 1886, denying relator's motion for a peremptory mandamus; and this appeal is taken from the whole and from every part of said order.

Dated April 29th, 1887.

JESSE LARRABEE,
Attorney for Relator.

To E. Henry Lacombe, Esq., counsel to the corporation, respondent's attorney, and to Nathaniel Jarvis, Esq., clerk of the court of common pleas for the city and county of New York.

40 Court of Common Pleas for the City and County of New York.

THE PEOPLE OF THE STATE OF NEW YORK, in the Relation of the New York Electric Lines Company,
against
ROLLIN M. SQUIRE, as Commissioner of Public Works in and for the City and County of New York.

I, Nathaniel Jarvis, Jr., clerk of the court of common pleas for the city and county of New York, do hereby certify that the foregoing copy of record in the above-entitled proceeding, and copy of order of the general term and notice of appeal to the court of appeals, is a true copy of the original thereof on file in my office and of the whole

of the said original constituting this return on the appeal to the court of appeals.

In witness whereof I have hereunto subscribed my name and affixed the seal of this court this 30th day of April, 1887.

NATH'L JARVIS, *Clerk.* [SEAL.]

41 STATE OF NEW YORK, *ss:*

Court of Appeals.

Pleas in the court of appeals, held at the Capitol in the city of Albany on the 17th day of January, in the year of our Lord one thousand eight hundred and eighty-eight, before the judges of said court.

Witness the Hon. William C. Ruger, chief judge, presiding.

E. O. PERRIN, *Clerk.*

Remittitur. January 18th, 1888.

THE PEOPLE, &c., *ex rel.* The New York Electric Lines Co., Appellant,
ag'st
ROLLIN M. SQUIRE, as Commissioner of Public Works, &c., Respondent.

Be it remembered that on the second day of May, in the year of our Lord one thousand eight hundred and eighty-seven, The New York Electric Lines Co, the appellant in this action, came here into the court of appeals, by Jesse Larrabee, its attorney, and filed in the said court a notice of appeal and return thereto from an order of the general term of the court of common pleas for the city and county of New York, and Rollin M. Squire, as commissioner of public works, &c., the respondent in said action, afterwards appeared in said court of appeals, by E. Henry Lacombe, counsel to the corporation, which said notice of appeal and the return thereto, filed as aforesaid, are hereunto annexed, whereupon the said court of appeals, this cause having been submitted by counsel for the
42 respective parties, and after due deliberation had thereon, did order and adjudge that the order of the general term of the court of common pleas for the city and county of New York appealed from in this action to this court be, and the same is hereby, affirmed, with costs.

And it was also further ordered that the record aforesaid and the proceedings in this court be remitted to the said court of common pleas, there to be proceeded upon according to law.

Therefore it is considered that the said order be affirmed, with costs as aforesaid.

And hereupon, as well as the notice of appeal and return thereto aforesaid as the judgment of the court of appeals aforesaid by them given in the premises and by the said court of appeals remitted into the court of common pleas for the city and county of New York, before the justices thereof, according to the form of the

statute in such case made and provided, to be enforced according to law, and which record now remains in the said court of common pleas before the justices thereof, &c.

E. O. PERRIN,
Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
ALBANY, *Jan'y 18th*, 1888.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the court of appeals, with the papers originally filed therein attached thereto.

[SEAL.] E. O. PERRIN, *Clerk.*

43 At a special term of the court of common pleas for the city and county of New York held at the county court-house, in said city, on the 20th of January, 1888.

Present: Hon. Joseph F. Daly, judge.

THE PEOPLE *ex rel.* The New York Electric Lines Company
against
ROLLIN M. SQUIRE, as Commissioner of Public Works for the City and County of New York.

The above-named relator having appealed to the court of appeals from the order of the general term of this court, entered herein on the 28th day of April, 1887, affirming the order of the special term entered the 22nd day of October, 1886, denying relator's motion for a peremptory mandamus herein, and the argument on said appeal having been duly heard and the court of appeals having in all things affirmed the order appealed from as aforesaid with costs, now, on reading and filing the remittitur from the court of appeals and on motion of Henry R. Beekman, counsel to the corporation, it is ordered that the judgment of the court of appeals herein be, and the same hereby is, made the judgment of this court.

Ent.—

J. F. D., *J. C. C. P.*

44 The United States of America to Rollin M. Squire, as commissioner of public works in and for the city and county of New York, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the court of common pleas for the city and county of New York, wherein The People of the State of New York, on the relation of the New York Electric Lines Company, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Samuel Blatchford, associate justice of the Supreme Court of the United States, this eighteenth day of May, in the year of our Lord one thousand eight hundred and eighty-eight.

SAM'L BLATCHFORD.

On this — day of ——, in the year of our Lord one thousand eight hundred and eighty- —, personally appeared —— —— before me, the subscriber, and makes oath that he delivered a true copy of the within citation to —— ——.

Sworn to and subscribed the — ——, A. D. 188–.

—— ——.

45 [Endorsed :] U.S. Supreme Court. The People of the State of New York, on the relation of the New York Electric Lines Company, plaintiff and appellant, against Rollin M. Squire, as commissioner of public works in and for the city and county of New York, defendant & respondent. Citation. David Leventritt, attorney for plaintiff & appellant, 320 & 322 Broadway, New York city. Due & timely service of a copy of the within citation is hereby admitted this — day of June, 1888. —— ——, attorney for defendant & respondent. A copy of the within paper has been this day received at the office of the counsel to the corporation. Jun- 7, 1888. Henry R. Beekman, counsel to the corporation.

46 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the court of common pleas for the city and county of New York, possessed of the record in this case by a remittitur from the court of appeals of the State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of common pleas for the city and county of New York, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The People of the State of New York on the Relation of the New York Electric Lines Company, as plaintiff, and Rollin M. Squire, as Commissioner of Public Works in and for the City and County of New York, as defendant, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the

47 Constitution or of a treaty or statute of or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a

manifest error hath happened, to the great damage of the said The People of the State of New York on the Relation of the New York Electric Lines Company, as by its petition appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Samuel F. Miller, senior associate justice of the said Supreme Court, the eighteenth day of May, in the year of our Lord one thousand eight hundred and eighty-eight.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
SAM'L BLATCHFORD,
Associate Justice of the Supreme Court of the United States.

May 18th, 1888.

48 STATE OF NEW YORK, }
City and County of New York, } *ss.:*

I, Nathaniel Jarvis, Jr., clerk of the court of common pleas for the city and county of New York, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following record, by a remittitur to this court from the court of appeals of the State of New York, is a true and complete transcript of the records and proceedings had in said court in the case of The People of the State of New York on the Relation of the New York Electric Lines Company, plaintiffs and appellants in error, against Rollin M. Squire, as Commissioner of Public Works in and for the City and County of New York, defendant and respondent in error, as the same remain of record and on file in said office.

In attestation whereof I have caused the seal of the said court to be hereunto affixed, in the city of New York, this 12th day of July, in the year of our Lord 1888, and of the Independence of the United States the 113th.

[Seal Common Pleas of New York.]

NATH'L JARVIS, Jr., *Clerk.*

[Endorsed:] U. S. Supreme Court. The People of the State of New York on the Relation of the New York Electric Lines Company, plaintiff & appellant, against Rollin M. Squire, as Commissioner of Public Works in and for the City and County of New York, defend-

ant & respondent. Writ of error. David Leventritt, solicitor for plaintiff, 320 & 322 Broadway, New York city. Rec'd June 7th, 1888. N. Jarvis, Jr., cl'k.

Endorsed on cover: New York court of common pleas, city & county of New York. No. 1241. The People of the State of New York *ex rel.* The New York Electric Lines Company, plaintiff in error, *vs.* Rollin M. Squire, as Commissioner of Public Works in and for the City and County of New York. Filed October 8, 1888.

145-U S 175

Supreme Court U. S.
FILED
FEB 25 1892
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States,

OCTOBER TERM, 1891.

THE PEOPLE OF THE STATE OF NEW YORK *Ex rel.* THE NEW YORK ELECTRIC LINES COMPANY, *Plaintiff in Error,*
vs.
ROLLIN M. SQUIRE, *as Commissioner of Public Works in and for the City and County of New York.*
} No. 185.

In Error to the Court of Common Pleas of the City and County of New York.

BRIEF AND ARGUMENT FOR THE PLAINTIFF IN ERROR.

E. M. MARBLE,
Attorney for Plaintiff in Error.

In the Supreme Court of the United States,

OCTOBER TERM, 1891.

THE PEOPLE OF THE STATE OF NEW YORK *Ex rel.* THE NEW YORK ELECTRIC LINES COMPANY, *Plaintiff in Error,*

vs.

ROLLIN M. SQUIRE, *as Commissioner of Public Works in and for the City and County of New York.*

No. 185.

IN ERROR TO THE COURT OF COMMON PLEAS OF THE CITY AND COUNTY OF NEW YORK.

BRIEF AND ARGUMENT FOR THE PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

The relator, plaintiff in error in this case, filed its petition in the Court of Common Pleas for the City and County of New York, praying for an order for a peremptory writ of mandamus to compel the defendant in error to grant the relator a formal written permit to open the streets and pavements of the City and County of New York to lay wires and other electric conductors thereunder, to which permit it had a right under a contract with the City of New York, which petition was denied by said Court, and upon successive appeals was finally denied by the Court of Appeals of said

State, and thereafter the record and all proceedings of said Court were remitted to the Court of Common Pleas, all of which appears in the record of the case.

The petition of the relator sets forth that it was incorporated and organized under chapter 265 of the Laws of 1848, and the acts amendatory thereof, of the laws of the State of New York, and the record shows that it was incorporated October 14th, 1882.

The certificate of incorporation of the relator, the Electric Lines Company, states the object of its incorporation as follows:

"For the purpose of owning, constructing, using, maintaining, and leasing lines of telegraph lines or other electric conductors for telegraphic and telephonic communication, and for electric illumination to be placed under the streets, avenues and public highways of the cities of New York and Brooklyn, in the State of New York, and under the sidewalks of the streets and avenues of the said cities, and upon, over, or under private lands in the said cities, within blocks of buildings erected or to be erected therein, and for the purpose of owning franchises for laying and operating the said lines of electric conductors, and the purchasing, owning and disposing of such real estate within the said cities, and such personal property as may, from time to time, be necessary and convenient to the building, using, maintaining and leasing the said lines of electric conductors upon the terms and conditions and subject to the liabilities prescribed in the Act of the Legislature of the State of New York, passed April 12th, 1848, entitled 'An Act to provide for the Incorporation and Regulation of Telegraph Companies,' being chapter 265 of the Laws of 1848, and the several acts amendatory thereof, and supplementary thereto." (Record fol. 8, pp. 5, 6.)

In the City and County of New York the charter of said corporation defined the courses and routes of its lines as follows:

"Starting at or near the Battery, to connect by the "several streets leading north and northeastward with "offices and depots at central points within said city, and "from these offices and depots to connect, by any and all "the streets, avenues and roads, with points in the north- "erly and easterly and boundary lines of the said City and "County of New York; generally, to wit: by Riverdale "Avenue and adjacent streets with Mount St. Vincent and "by Broadway, McComb's Dam Road, Central Avenue, "and adjacent channels of communication with the boun- "dary line of the town or city of Yonkers and Woodland "Heights, and through the various streets, avenues and "roads of Harlem, Morrisiana and Tremont, with points on "the Bronx River and the boundary of the County of "Westchester; and, further, to connect the several offices, "depots and points within the outlying limits defined with "each other and with public buildings and offices, and with "private offices and residences within the said City and "County of New York, and with points of electric illumi- "nation and telegraphic and telephonic signal above the "streets and public highways thereof."

It appears by the relator's petition that on or about April 16th, 1883, it entered into a contract with the Mayor, Aldermen and Commonalty of the City of New York, whereby, in consideration of its promises to comply with the provisions, requirements, restrictions, conditions and limitations contained in the ordinances of said municipality, set forth in exhibits A and B, forming a part of the record of the case (Record fols. 11–16, pp. 7–10), the said city agreed to grant, and did grant to the plaintiff the right or franchise "to lay wires or other conductors of electricity "in and through its streets, avenues and highways, and to "make connections of such wires or conductors under- "ground by means of vaults, test boxes and distributing "conduits, and above ground with points of electrical "illumination, telegraphic and telephonic signals or sta- "tions."

By Paragraph 1 of Exhibit A (Record fol. 13, p. 8), it will be seen that relator's franchise was made in conformity to an ordinance of said city, entitled an "ordinance to "regulate the laying of subterranean telegraph wires and "electric conductors in the streets of the city," passed by the Common Council and approved by the Mayor December 14th, 1878.

As a part of the contract entered into between the relator and the City of New York on April 16th, 1883, and as a part of the consideration for its franchise, it was further provided, as shown by paragraph 4 of Exhibit A (Record fols. 13 and 14, p. 9), "that in addition to the requirements "and provisions to be observed contained in the said ordi- "nance, the said New York Electric Lines Company, as a "further compensation for the opening and use of the "streets of the city, shall pay into the said treasury, within "ten days after taking up the pavements, for each one "thousand feet in length of trench to be excavated, the "maximum sum or sums of money which have been or "which may hereafter be required of grantees or licensees, "to be paid under any general or special ordinance of the "Common Council heretofore enacted, authorizing the lay- "ing of electric conductors under the streets of the city."

By the seventh paragraph of the ordinance passed December 14th, 1878, Exhibit B, and made a part of the contract, it was provided: "Whenever routes of several wires shall "be laid by and under the provisions of this ordinance, that "one wire in each route shall be reserved for the use of the "police and one for the fire-alarm telegraph, and the use of "the same shall be donated to the city and county of New "York by the parties laying such lines or wires free of any "price or charge therefor." (Record fol. 15, p. 10.)

By paragraph six of Exhibit A (Record fol. 14, p. 9), it was provided as a part of the contract: "That the city shall "have the option, after the first day of January, 1885, to re- "quire that the said New York Electric Lines Company shall "pay into the city treasury two per cent. of its gross receipts

"derived from the rental of its wires under the franchise "hereby granted, in lieu of the donation to the city of the "two wires in each line of conductors, as provided in the "general ordinance passed and approved as aforesaid, and "said option may be declared at any time after the 1st day "of January, 1885, by resolution of the Common Council."

By paragraph six of the ordinance passed December 14th, 1878, above mentioned, it is provided that "grantees under "this ordinance shall be required, within six months after "such permission shall be granted, to file with the county "clerk maps, diagrams, and tabular statements, including "the amount and position of the spaces proposed to be occu-"pied by them, and their rights and privileges under this "ordinance shall be confined to the spaces, positions and "localities as indicated by said maps, diagrams and state-"ments." (Record fol. 15, p. 10.)

By the third paragraph of the relator's petition, (Record fol. 3, p. 2,) it appears that the relator "on or about May 18th, "1883, duly filed in the office of the Clerk of the County "of New York a map, diagram and tabular statement, in-"cluding the amount and position and localities of the "spaces proposed to be occupied by your petitioner in and "under the streets and other land in the city and county of "New York, and thus, as petitioner claims, located, adopted "and appropriated by your petitioner said spaces in the ex-"ercise of the franchise granted to it as aforesaid, and in "the fulfillment of its terms and requirements, in accord-"ance with the provisions of said revised ordinances of 1880 "set forth in Exhibit B."

By relator's petition, it further appears that immediately after the filing of said map, diagram and tabular statement above mentioned, it "proceeded to make ready its material "and plant for the construction of its electrical conductors "and underground lines in the city of New York, to de-"velop and elaborate its mechanical constructions for the "same, and made ready machinery and appliances and im-

"plements for its said works, in pursuance of the objects "of its incorporation, at great expense to your petitioner."

It also appears by the relator's petition that since the execution of its contract above mentioned, it "has purchased "and partly paid for and become obligated to pay the sum "of fifty thousand dollars and upwards for property essen- "tial to the due performance of said contract, and more "than three thousand shares of the capital stock of your "petitioner, of the par value of one hundred dollars each, "have been issued by your petitioner since the execution of "said contract to persons who have purchased the same in "reliance upon the said contract and franchise."

By the fourth paragraph of the ordinance, Exhibit B, (Record fol. 15, p. 10), it is provided that "the work of re- "moval and replacement of the pavements in any and all "of the streets, avenues, highways and public places in and "through which the wires of any telegraph company shall "be laid, shall be subject to the control and supervision of "the Commissioner of Public Works. Excavations in any "and all of the unopened streets, avenues, highways, or "public places shall also be subject to like control and su- "pervision."

By relator's petition (Record fols. 5 and 6, p. 4), it appears that, by section 140 of the ordinances of the Mayor, Aldermen and Commonalty of the City of New York, which were revised in the year 1880, and are still in force, it is provided that "no pavement in any street of the City "of New York which has been accepted by the corporation "to be kept in repair, at the public expense, shall hereafter "be taken up or the paving stones removed therefrom for "any purpose whatever, without the authority of the De- "partment of Public Works, under the penalty of one "hundred dollars for every offense."

By relator's petition (Record fol. 6, p. 4), it appears that on July 21st, 1886, the relator, at that time being ready to commence active operations in the streets of the City of New York, requested the defendant to give it "a permit

"and written authority to open the streets and remove the "paving stones therefrom in the City and County of New "York for the purpose of laying your petitioner's wires "and other conductors of electricity, and of making con- "nections of the same in accordance with the benefits and "conditions of its said franchise."

It further appears in the relator's petition that said request was denied because the relator had not obtained the approval of certain persons alleged to have been created subway commissioners by an act of the Legislature of the State of New York. (Record fol. 6, p. 4.) A copy of the act of the Legislature of the State of New York, passed June 13th, 1885, upon which such refusal was made, forms Exhibit C of the record of this case (Record, fols. 16–22, pp. 10–14); and the act amendatory thereof, passed May 29th, 1886, appears in the record as Exhibit D. (Record, fols. 22–25, pp. 14–16.)

After such refusal by the defendant to grant to the relator the written permit to open the streets of the City of New York, as requested, the relator filed its petition in the Court of Common Pleas of the City and County of New York, praying for a writ of mandamus, directed to the defendant to compel him to issue such permit, because it had no other adequate remedy in the premises, by action at law or otherwise, to secure its rights (Rec., fols. 2–7, pp. 1–7); and thereupon proceedings were had in the case, as hereinbefore stated, the Court holding that the acts of 1885 1886, Exhibits C and D, Rec., fols. 16–24, pp. 10 to 15, are applicable to the relator's contract and franchise; that said acts are valid and do not materially impair the relator's contract; and that they were properly passed under the police power of the State.

We shall not discuss some of the questions which were raised before the Courts of the State of New York, because this Court has repeatedly held that it will not consider whether the statutes of a State are in violation of the Constitution of said State, but will only consider whether the

acts of the legislature are in violation of a law of Congress, a treaty, or the Constitution of the United States.

ASSIGNMENT OF ERRORS.

1. The Court erred in holding that the acts of the Legislature of the State of New York of 1885 and 1886, Exhibits C and D, Rec., fols. 16 to 24, were applicable to the relator, its contract and franchise, made with and obtained from the City of New York through its proper officers.

2. The Court erred in holding that the acts of the Legislature of the State of New York of 1885 and 1886, Exhibits C and D, Rec., fols. 14 to 24, did not impair the contract made between the City of New York and the relator, if said acts are applicable thereto.

3. The Court erred in holding that the acts of the Legislature of the State of New York of 1885 and 1886 (Exhibits C and D, Rec., fols. 16–24), are valid, as applied to the relator's contract and franchise, because said acts provide for the taking away of the relator's rights under its franchise without due process of law.

4. The Court erred in holding that the acts of the Legislature of the State of New York of 1885 and 1886, Exhibits C and D, Rec., fols. 16 to 24, are police regulations, and were passed in the proper exercise of the police power of the State.

5. The Court erred in not granting the writ of mandamus against the defendant, as prayed, notwithstanding the acts of the Legislature of the State of New York of 1885 and 1886, Exhibits C and D, Rec., fols. 16 to 24.

I.

THE COURT ERRED IN HOLDING THAT THE ACTS OF THE LEGISLATURE OF THE STATE OF NEW YORK OF 1885 AND 1886, EXHIBITS C AND D, REC., FOLS. 16 TO 24, WERE APPLICABLE TO THE RELATOR'S CONTRACT AND FRANCHISE, MADE WITH AND OBTAINED FROM THE CITY OF NEW YORK, THROUGH ITS PROPER OFFICERS.

First.

Statutes will be Construed in Accordance with the Purpose for Which They Were Passed.

The purpose for which the act of June 13, 1885, was passed, was to convert existing overhead systems of electrical wires and cables into underground systems, and this purpose is expressly so declared.

In section 4 of said act, referring to the duties of the Board of Commissioners, we find the following:

* * * "It is hereby made the duty of said Board of Commis-
"sioners in granting any such permit for other than under-
"ground electrical connections, *to bear in mind the policy and*
"*purpose of this act, which is to convert the overhead systems of*
"*electrical wires and cables* now in use *in said cities to under-*
"*ground systems* as soon as possible without impairing the
"efficacy of their service; *to require* that, as fast as practi-
"acble, *all electrical conductors* in any street, avenue, or other
"highway of any such city *shall be removed from the surface*
"*and placed and operated underground*, as soon as may be con-
"sistent with the convenient use thereof by the public; and
"that it is intended hereby to authorize other than under-
"ground electrical conductors, to be used in the streets,
"avenues, or other highways of any city only when and

"where the public interests do not require the electrical "conductors to be placed underground, or when and where "it shall be deemed by the Board itself to be impracticable "to place and operate the conductors advantageously under- "ground as aforesaid, *and that it is hereby intended to make all "aerial and other electrical connections incidental only to such "underground methods* and to require that they be author- "ized only when and where needed for the convenient use "of the public, or when and where the underground con- "ductors can be made thereby more useful." (Rec. fols. 18, 19, p. 12.)

In section 2 of said act, in defining the duty of said Board of Commissioners, the act provides as follows:

* * * "and it is hereby made the duty of said Board of "Commissioners *to cause to be removed from the surface and put, maintained and operated underground*, wherever practicable, all "electrical wires or cables used or to be used in the business "of *such company* in any street, avenue or other highway, in "any such city, so as to enable and require all duly-author- "ized companies operating or intending to operate electrical "conductors in any street, avenue or highway of any such "city, as is or shall be affected by the provisions of said act, "to transact their business with underground conductors "wherever practicable." (Rec., fols. 16, 17, p. 11).

By section 3 of said act it is provided:

"When any company operating or intending to operate "electrical conductors in any such city *shall desire or be "required* to place its conductors, or any of them, under- "ground in any of the streets, avenues or other highways "of any such city, *and for that purpose to remove the same from "the surface thereof, and shall have been duly authorized to do so*, "it shall be obligatory upon *such company* to file with said "Board of Commissioners a map or maps, made to scale, "showing the streets, or avenues, or other highways which "are desired to be used for such purpose, giving the gen- "eral location, dimension and cost of the underground con- "duits desired to be constructed. Before any such conduits

"shall be constructed, it shall be necessary to obtain the "approval of said Board of said plan or construction so "prepared by *such company;* and said Board has and shall "have power to require that the work of *removal* and of "*constructing every such system* of underground conductors "shall be done according to such plan so approved, sub- "ject at all times to such modification as shall, from time to "time, by the Board be made, and subject also to the rules "and regulations, not inconsistent herewith, prescribed or "to be prescribed by the legal authorities having control of "such streets, avenues or other highways of such city."

By section 4 it is provided:

"It shall be the duty of said Board of Commissioners to "carefully investigate all methods proposed by any *such* "*company* for electric lighting or electrical communication "by the use of conductors along or across any street, ave- "nue, or other highway of any such city; *and before ap-* "*proving of any such method*, said Board of Commissioners "shall require that, so far as practicable, all such conduct- "ors when constructed shall be underground. (Rec., fols. 17, 18, pp. 11, 12.)

Sections 7 and 8 of said act, as amended by the act passed May 29th, 1886, recognize the purpose of said act as follows:

"SEC. 7. * * * the amount of such salaries and ex- "penses shall, in such proportion as is prescribed in section "8 of this act, be by the Comptroller assessed upon and col- "lected from the several companies operating electrical "conductors in any such city of the State which, under the "provisions of this act, are or shall be required *to place and* "*operate any of their conductors underground.*

"SEC. 8. * * * and the several companies which are "or shall be required, under the provisions of this act, to "*place and operate any of their conductors underground*, shall "be by the Comptroller assessed rateable according to the "number of miles of such wires, which the Comptroller

"shall be certified to be operated by them respectively." (Rec., fols. 22–24, pp. 14, 15.)

We have thus quoted at length from the acts of 1885 and 1886, for the purpose of showing that the Legisture of the State of New York in passing said acts intended to have the same apply to, and only to, the existing overhead systems then in use, and to permit such overhead systems to remain as they were only when and where it was impracticable in the suburban or thinly-inhabited parts of the city for companies to place their systems underground.

Clearer and more explicit language than is used in these acts to express the purpose for which they were passed can hardly be conceived. There is no provision in either of said acts which provides for any action or supervision by the Board of Commissioners in connection with such a system as the relator obtained a franchise to construct under the streets, avenues, and highways of the city of New York.

On the contrary, as will be seen by reference to the second section of the act of 1885, it is made the duty of the Board of Commissioners "*to cause to be removed from the surface and put, maintained and operated underground, whenever practicable, all electrical wires or cables used or to be used* in the business of any *such company.*"

And in section 3, referring to any company operating or intending to operate electrical conductors underground, "*and for that purpose to remove the same from the surface thereof, and shall have been duly authorized to do so,* it shall be obligatory upon *such company* to file with said Board of Commissioners a map or maps, made to scale, showing the streets or avenues, or other highways, which are desired to be used for such purpose, and giving the general location, dimension and cost of the underground conduits desired to be constructed."

Particular attention is called to the clause, "*and shall have been duly authorized to do so,*" in the foregoing excerpt taken from section 3, which shows that the Legislature intended the act to apply only to companies which should *thereafter*

acquire the right to place their wires and cables underground, and had no reference to any other companies.

It will be observed that in both of said sections where reference is made to "*such company*," it is a company which shall be required to remove its electrical conductors from the surface underground.

Thus, in the third section it is provided, "it shall be "obligatory upon *such company* to file with said Board of "Commissioners a map or maps." The "*such company*" mentioned in said section is one which shall "desire or be "required to place its conductors, or any of them, under-"ground * * * *and for that purpose to remove the same "from the surface thereof*"; and in the last clause of said section it is provided, "Before any such conduits shall be con-"structed it shall be necessary to obtain the approval of "said Board of said plan of construction so proposed by "*such company*."

Again, in section 4 it is provided, "It shall be the duty "of said Board of Commissioners to carefully investigate "any and all methods proposed by any *such company*."

There is another significant provision in section 4 which confirms the view heretofore expressed with reference to the companies which are intended by said act, and this relates to the time within which plans must be submitted to said Board of Commissioners. This act was passed on June 13, 1885, and in the fourth section, the following provision is found: "provided no suitable plan is proposed or in use, "*within sixty days after the passage of this act*, it shall be the "duty of such Board to cause to be devised and made ready "for use such a general plan as will meet the requirements "of said act and of this act."

This provision, taken in connection with the other provisions referred to in sections 2 and 3, together with the first clause of section 4, leaves no doubt that the entire act, so far as it provides for underground systems of electrical wires and cables, had reference to the existing overhead systems, because the limit of time fixed by the clause last

quoted is so short that it would be unreasonable to expect any other than companies operating such systems to submit a plan or have a system in use within the time mentioned, for the consideration of said Board of Commissioners.

The purpose of this act, therefore, is to be found in sections 2, 3, and the first part of section 4, independent of the positive declaration in the latter part of section 4, where in referring to the duty of the Board of Commissioners, it is expressly enacted that said Commissioners are "to bear in "mind the *policy* and *purpose* of this act, which is to convert "the overhead systems of electrical wires and cables *now* "*in use* in said cities *to underground systems.*"

The object for which the act of 1885 was passed is further shown in Sec. 6, Rec. fols. 20 and 21, where it is provided that "the term of office of said Commissioners shall expire "on the first day of November, 1887, *or sooner upon the* "*performance of their functions as herein prescribed.*"

This provision, we submit, shows that the act of 1885 was intended to be temporary, and that the Commissioners were to be temporary officers, and were only to perform such functions as were therein prescribed. It also shows that it was not the intention of the Legislature to confer upon said Commissioners any duties not prescribed in said act, that is, specially mentioned.

For the performance of such duties as were prescribed, it was considered that the interregnum between the date of their appointments and November 1st, 1887, was amply sufficient, and the language of the act shows that it was considered that a shorter period might be sufficient.

Evidently it was not intended that the Commission should be permanent nor assume control of more than was prescribed in the act, but, on the contrary, when the special duty for which said Commission was created and temporarily appointed, had been performed, it was intended that said Commission should expire by the terms of the act.

There is nothing in relator's franchise which required it to commence laying its wires, cables and conduits in and

under the streets of said city during the life of said Commission, and hence it cannot be said that the relator was, or was intended to be, in any way subject to it.

Nothing, therefore, can be plainer from the language of the several sections of this act than that the intent of the Legislature in passing said act was simply, and only, to compel existing companies to convert their overhead systems into underground systems; and such being the case, we submit that the act should be construed according to its purpose, and not to include more than the legislature intended.

In support of this proposition we call attention to the following cases: United States *vs.* Saunders, 22 Wall., 492; Platt *vs.* Union Pacific Railroad Company *et al.*, 9 Otto, 48; James *et al. vs.* City of Milwaukee, 16 Wall., 159.

In the latter case, the Court said, in relation to the construction of the statute under consideration:

"*In this inquiry the intention of the Legislature is to be sought* "*for. That, whatever it may be, constitutes the law.*"

In United States *vs.* Union Pacific Railroad Company, 1 Otto, 72, the Court said, referring to the act of Congress under consideration:

"*The act itself speaks the will of Congress, and this is to be* "*ascertained from the language used.*"

To the same purport are the following cases:

People *vs.* Dana, 22 Cal., 11;
Canal Company *vs.* Railroad Company, 4 Gill & J., 152;
O'Brien *vs.* Somerville, 8 Md., 444;
Johnson *vs.* Collins, 3 Cowan, 89;
People *vs.* Utica Ins. Company, 15 Johns., 358.

Statutes should not be construed to include cases not intended to fall within them.

Estates of Ticknor, 13 Mich., 24;
Workman *vs.* Campbell, 46 Mis., 305.

The uniform construction of statutes by this Court, and also by the Courts of the several States, as shown by the

authorities above cited, is to ascertain the intention of the legislature in passing the law, and when such intention or purpose is found, to give such construction to the law as will carry out that intention or purpose. In the act of 1885, as we have seen, the Legislature of the State of New York intended to make it obligatory upon companies to convert their overhead systems of electrical conductors into underground systems, and such is its expressed object and purpose.

The franchise obtained by the relator authorized it to construct only underground conduits and to lay therein electrical wires and cables. The contract made with the City of New York, through its proper officers, as will be seen by the record, was limited to such construction of conduits and means of electrical communication.

There is nothing, therefore, in the contract and franchise of the relator upon which the acts of 1885 and 1886 can operate. There was nothing to change, nothing to correct in such contract and franchise, and said acts could not, therefore, apply thereto.

We, therefore, submit that the acts of 1885 and 1886, when considered according to the purpose and intention expressed therein, do not apply to the relator and its contract; and the court, therefore, erred in holding that they did so apply.

SECOND.

STATUTES WILL NOT BE CONSTRUED TO ACT RETROACTIVELY UNLESS THEIR LANGUAGE IMPERATIVELY REQUIRE SUCH CONSTRUCTION.

The contract between the City of New York and the relator, was made on April 16th, 1883, when the relator accepted the franchise granted it by the Mayor and Aldermen of the City of New York (Rec., fol. 12, p. 8), upon the terms and conditions mentioned therein, and it was fully completed

and perfected by the filing of a map, diagram and tabular statement indicating the amount, position and localities of the spaces to be occupied in and under the streets and other lands in the City and County of New York, on May 18th, 1883. This map was filed in accordance with the sixth clause of Exhibit B (Rec. fols., 15, 16, p. 10), which forms a part of the contract and franchise made with and obtained from said city.

By reference to the fourth and sixth clauses of Exhibit A, (Rec. fols. 13, 14, pp. 8, 9,) it will be seen that the franchise granted to the relator was not based simply on the agreement to comply with the ordinances and regulations which had been or might be passed by the Common Council of said city, but had as well a money consideration, which was to be paid by the relator into the treasury of said city, and that the city had the option, either to accept the two wires for the use of the police, and for the fire-alarm telegraph, as a donation, or in lieu thereof a money consideration of two per cent. on the gross receipts of said company. In other words, the franchise granted to the relator was granted in part, if not wholly, upon a money consideration to be paid to said city.

A franchise obtained in this manner is lawful, under the Constitution and laws of the State of New York, as appears by the decision of the Court of Appeals in the case of The People *vs.* O'Brien, 111 N. Y. Rep., pp. 30, 31.

It appears by the petition of the relator that, immediately after obtaining such franchise, it "proceeded to make ready "its material and plant for the construction of its electrical "conductors and underground lines in the city of New "York, to develop and elaborate its mechanical construc- "tion for the same, and make ready machinery and appli- "ances and implements for its said works, in pursuance of "the objects of its incorporation, at great expense to your "petitioner."

It further appears by said petition that upwards of fifty thousand dollars have been expended in the purchase of prop-

erty essential to the due performance of its contract with the city of New York, and that a large amount of stock of said company has been sold to persons who purchased the same in good faith, and in reliance upon said contract and franchise.

Thus it will be seen that all of the conditions essential to a valid contract, the acceptance of the same, and the fulfillment thereof, have been complied with by the relator, and that the most important of said acts were done before either of the acts of the Legislature of the State of New York referred to were passed. The franchise thus granted to the relator was in all respects similar in character to the one under consideration by the Court of Appeals of the State of New York in the case of People *vs.* O'Brien (*supra*), in which the Court said:

"The title to streets in New York is vested in the City "in trust for the people of the State, but under the Consti- "stution and statutes it had authority to convey such title "as was necessary for the purpose to corporations desiring "to acquire the same for use as a street railroad. The City "had authority to limit the estate granted either as to the "extent of its use or the time of its enjoyment, and also "had power to grant an interest in its streets for a public "use in perpetuity, which should be irrevocable; citing, "Yates *vs.* Van De Bogert, 56 N. Y., 526; People *vs.* "Sturtevant, 9 *id.*, 263; Davis *vs.* Mayor, &c., 14 *id.*, 506; "Millhaus *vs.* Sharp, 27 *id.*, 611; Mayor, &c., *vs.* 2d Ave. "R. R. Co., 32 *id.*, 261; 6th Ave R. R. Co. *vs.* Kerr, 72 *id.*, "330."

The fact that the relator did obtain a legal franchise in April, 1883, from the City of New York is recognized by the Court of Common Pleas in its decision, which appears in the record of this case (Rec., fols. 26, 27, pp. 16, 17); and also by the Court of Appeals, Vol. 107, N. Y. Rep., p. 593.

An examination of the record will show that its franchise was obtained by the relator in this case in the same manner as the franchise under consideration in the case of Peo-

ple *vs.* O'Brien *et al* (*supra*). In that case it is stated, "previous to December 4th, 1884, this company applied to the "municipality of New York for authority to lay tracks and "run cars over Broadway from the Battery to Fifteenth "street, and on that day *by resolution of the Common Council* "*the consent of the city was given upon the terms and conditions* "*prescribed in the resolution granting it, among which was the* "*annual payment of a considerable sum of money to the municipality.*" (P. 31.)

In passing upon the validity of the title thus obtained in that case the Court further said:

"We are, therefore, of the opinion that the Broadway "Surface Railroad Company took an estate in perpetuity in "Broadway through its grant from the city, under the au- "thority of the constitution and the act of the Legislature. "*It is also well settled by authority in this State that such a right* "*constitutes property within the usual and given signification of* "*that word.*" Citing 6th Ave. R. R. Co. *vs.* Kerr, 72 N. Y., 330; People *vs.* Sturtevant, 9 *id.*, 263.

This conclusion was reached upon a consideration of several of the decisions of the Court of Appeals of the State of New York, and among them the decision of Judge Selden in Milhau *vs.* Sharp, 27 N. Y., 611, in which the Court said, in relation to the franchise obtained in that case:

"It amounted to an immediate grant of an interest, and "it would seem of *a freehold in the soil of the street* to the "defendants. The rails, when laid, would become a part "of the real estate, and the exclusive right to maintain them "perpetually is vested in the defendants, their successors "and assigns. I say perpetually, because there is no limita- "tion in point of time to the continuance of the franchise, "and no direct power is reserved to the corporation to ter- "minate it. * * * The title to the rails when perma- "nently attached to the land, *and such right in the land as* "*may be requisite for their perpetual maintenance are, therefore,* "*granted* to the defendants *by the resolution.*"

In the case of Mayor, &c., *vs.* 2d Ave. R. R. Co., 32 N. Y., 272, it was said:

"Assuming that the Common Council had power to make "the grant, then its acceptance by Pearsall and his asso- "ciates signified by the execution of the agreement with "the conditions annexed thereto, and the duties and obli- "gations resulting therefrom, *invested the latter with the right* "*of property in the franchise* which the Common Council "could not take away or impair by any subsequent act of "its own."

In this case it is submitted that the relator, by its franchise, obtained the same rights and estate in the streets, highways, avenues, and public places in the City of New York, which it was held by the Court of Appeals of said State the corporations obtained in the cases to which reference has been made.

So far as appears, the relator did more than either of said corporations did, in this, that, in compliance with the ordinance of the Mayor and Common Council of the City of New York, Exhibit B, Rec., fols. 14 to 16, which forms a part of the contract and franchise of the relator, it filed "a "map, diagram and tabular statement indicating the amount "and position and localities of the spaces proposed to be oc- "cupied * * * in and under the streets and other land "in the City and County of New York."

Having thus acquired by its franchise a right of property in the streets of said city, and thereafter having prosecuted its work faithfully to carry out and fulfill the undertaking upon which it had entered, we submit that the acts of 1885 and 1886 referred to, cannot be held to apply to the franchise and contract of the relator, unless it be held that said acts must be construed to operate retroactively.

We deny that there are any provisions in said acts upon which a retroactive construction can be based, and we think we have shown that said acts are temporary and prospective rather than retroactive in their provisions.

In support of our contention, we call attention to the following decisions of the courts of New York:

In the case of Dash *vs.* Van Vleeck, 7 John., 577, the Court said:

"It is a priciple of universal jurisprudence that laws, "civil and criminal, must be prospective, and cannot have a "retroactive effect."

And in Benton *vs.* Wickwire, 54 N. Y., 229, the Court declared that—

"Neither original statutes nor amendments can have any "retroactive effect unless, in exceptional cases, the Legis- "lature so declare."

People *vs.* Supervisors, 43 N. Y., 130;
People *vs.* McCaulley, 94 *id.*, 587;
N. Y. & O. M. R. R. Co, *vs.* Van Horn, 57 *id.*, 473.

We also call attention to a few of the decisions of this Court for the purpose of showing that the same rule which obtains in the construction of statutes in the State of New York are enforced and applied by this Court.

In the case of Chew Heong *vs.* United States, 112 U. S., 536, this Court, through Mr. Justice Harlan, said:

"We have stated the main reasons which in our opinion "forbid that interpretation of the act of Congress. To these "may be added the further one, that the courts uniformly "refuse to give to statutes a retrospective operation, "whereby rights previously vested are injuriously affected, "unless compelled to do so by language so clear and posi- "tive as to leave no room to doubt that such was the inten- "tion of the Legislature."

In United States *vs.* Heath, 3 Cranch, 413, this Court said:

"Words in a statute ought not to have a retrospective "operation unless they are so clear, strong and imperative "that no other meaning can be annexed to them, or unless "the intention of the legislature cannot be otherwise satis-

"fied. And such is the settled doctrine of this Court." Citing:

Murray *vs.* Gibson, 15 How., 423;
McEwen *vs.* Den, 24 How., 243 4;
Harvey *vs.* Tyler, 2 Wall., 347;
Sohn *vs.* Waterson, 17 *id.*, 599;
20 Per Cent Cases, 20 *id.*, 187.

It will thus be seen that the decisions of the Court of Appeals of the State of New York on this question are in perfect harmony with the decisions of this Court, and that the uniform rule is, that statutes will not be given a retroactive effect unless by the words of the statute such construction is imperatively necessary.

In order, therefore, that the acts of 1885 and 1886 shall be made to apply to the relator, its franchise and contract, it must be found that said acts, in express terms, include said contract and franchise.

To give said acts such construction, it must be held that it was the intention of the Legislature of the State of New York to treat the relator as if it had acquired no rights to lay wires, cables and other electrical connections under the streets of the city of New York by virtue of its franchise; that the filing of its map, diagram and tabular statement was without effect, and that the relator must proceed *de novo* as if nothing had been done. In other words, to include the relator it must be held that it had acquired no fixed or definitely located property rights by virtue of its franchise and what it had done, and that, therefore, it must take the same steps which other companies desiring to lay electric wires, cables and conduits under said streets were bound to take under said acts. We submit that there is nothing in said acts which required the relator to present to the Board of Commissioners its map, diagram and tabular statement, filed with the clerk of the County of New York on May 18th, 1883, for the approval of such board; and we also submit that there is nothing in said acts which in any man-

ner or respect applies to the relator, in order that it shall be entitled to have a permit to open the streets of the City of New York to lay its wires and cables in accordance with its franchise. This right the relator had already obtained, and under the decisions of the courts of the State of New York no acts of the Legislature of said State could take it away.

For these reasons we respectfully submit that the Court erred in holding that the acts of 1885 and 1886 applied to the relator or to the franchise which it obtained from the City of New York.

II.

THE COURT ERRED IN HOLDING THAT THE ACTS OF THE LEGISLATURE OF THE STATE OF NEW YORK OF 1885 AND 1886, (EXHIBITS C AND D, REC., FOLS. 16 TO 24) DID NOT IMPAIR THE CONTRACT MADE BETWEEN THE CITY OF NEW YORK AND THE RELATOR, IF SAID ACTS ARE APPLICABLE THERETO.

First.

Statutes Imposing Conditions not Expressed in a Contract Impair its Obligation.

The first, second and third clausesof the grant to the relator read as follows:

"*Resolved, That permission be, and hereby is, granted to* "the New York Electric Lines Company to lay wires or "other conductors of electricity in and through the streets, "avenues and highways of New York City, and to make "connection of such wires or conductors underground by "means of the necessary vaults, test-boxes and distributing "conduits, and thence above ground with points of electric "illumination or of telegraphic or telephonic signal in ac- "cordance with the provisions of an ordinance 'To regulate "'the laying of subterranean telegraph wires and electric

"'conductors in the streets of the city,' passed by the Com-
"mon Council and approved by the Mayor, December 14th,
"1878: Provided, however, and it is hereby ordained and
"*Resolved*, That whenever the said New York Electric
"Lines Company, in the progress of laying its lines of elec-
"tric conductors, shall be prevented or obstructed from
"placing its wires in the spaces which may have been gen-
"erally selected under the ordinance passed and approved
"as aforesaid by manholes of sewer, gas, steam or water
"mains, or other underground or pavement impediments
"now or hereafter existing, then and in such cases the said
"company may, under the provisions hereby granted, vary
"the space selected by adopting, appropriating and using
"equivalent and nearest practicable spaces, as may be found
"necessary; and provided further, and it is hereby further
"*Resolved and ordained*, That the connection vaults or
"test-boxes aforementioned may be extended underground
"not more than four feet in depth or two feet in any lateral
"direction beyond the limited spaces contemplated for the
"lines of wires in the ordinance passed and approved as
"aforesaid, and may be fitted with covers or other means of
"access at the level of the pavements of the several streets
"and avenues." (Rec., fols. 13, 14, pp. 8, 9.)

It has uniformly been held by this Court that the words "*there be and hereby is granted*" import a grant *in presenti*.

Railroad Co. *vs.* Smith, 9 Wall., 95;
Schulenberg *vs.* Horriman, 21 Wall, 60;
L. L. & G. R. R. Co. *vs.* United States, 92 U. S., 733.

We submit that the words "*that permission be and* "*hereby is granted*," occurring in the first clause of the relator's franchise, are words of like import and should be construed and held to have the same force as where grants are made of the entire title to lands.

We have shown that the Mayor and Aldermen of the City of New York had the authority to grant such a fran-

chise, and having such authority, they had the right to make it a grant *in presenti*, and to make such grant take effect at any time they might determine. The language used indicates that the franchise was to take immediate effect and to have force from its date.

The only clause in the ordinance passed by the Common Council and approved by the Mayor December 14th, 1878, (Exhibit B, Rec. fols. 14–16), which can be said in any way to have reference to the title of the relator to particular streets, avenues and highways of New York City, is the following:

"Grantees under this ordinance shall be required within "six months after such permission shall be granted to file "with the county clerk maps, diagrams and tabular state- "ments, including the amount and position of the spaces "proposed to be occupied by them, and their rights and "privileges under this ordinance shall be confined to the "spaces, positions and localities as indicated by said maps, "diagrams and statement."

It appears from the record that, on May 18th, 1883, the map, diagram and tabular statement required by the article of the ordinance just quoted, was filed by the relator with the Clerk of the County of New York. By the filing of said map, diagram and statement, the right of the relator under its franchise to the "spaces, positions and localities" in and under the streets of the City of New York, which were indicated on said map, diagram and tabular statement, became certain, and *by relation* said spaces, positions and localities were included in the grant the same as if they had been mentioned in the franchise.

L. L. & G. R. R. Co. *vs.* United States (*supra*).

We think the principle is the same in this case as that announced by this Court through Mr. Justice Field, in the case of Van Wyck *vs.* Knevals, 16 Otto, 300, in passing upon the question of when the grant to the State of Kansas for the use and benefit of the Denver & St. Joseph Railroad Company took effect and the lands granted thereby were

determined. In that case it was held that when the railroad company filed with the Secretary of the Interior a map of its lines approved by its directors, designating the route of the proposed road, the right of said road was "definitely fixed," and that thereafter the right of the State and of the company to the lands granted was perfect, and thereby the lands granted were determined.

The same view was taken by this Court upon another grant of similar character in the case of Waldon *vs* Knevals, 114 U. S., 373, and also in the case of the St. Joseph & Denver City Railroad Company *vs.* Baldwin, 13 Otto, 426.

At the present term of this Court the same rule was announced through Mr. Justice Brewer in the case of the Sioux City and Iowa Falls Lot and Land Company *vs.* Thomas L. Giffey *et al.*

So far as we know, the decisions of this Court are uniform in holding that where a grantee or a beneficiary under a grant, has complied with the condition of said grant by filing a map locating its grant and determining its limits, boundaries and quantity, from that moment the grant attaches, and unless there are conditions subsequent, the right of the grantee or beneficiary is complete to the lands granted.

The same view was taken in Milhau *vs.* Sharp (*supra*) with reference to a grant from the Common Council of New York in no material respect different from the franchise in this case in which Judge Selden said:

"It amounted to an immediate grant of an interest, and it would seem of a freehold, in the soil of the street to the defendants."

In the case of Brooklyn Central Railroad Company *vs.* Brooklyn City Railroad Company, 32 Barb., 364, the Court said:

"The grant to the said Railroad Company and its accept-
"ance on the conditions annexed, with the duties and obli-
"gations and large expenditures resulting therefrom would
"seem, therefore, upon the principles I have endeavored to
"state, to invest the company with the right of property in

"the franchise of which it cannot be deprived without its "consent or against its will."

Numerous other decisions of the Court of Appeals of the State of New York to the same effect might be cited.

In the view we take of the case, the relator had a right of property in perpetuity in the streets, avenues and highways of the City of New York from the date of its franchise, and this right became fixed and definitely located on May 18th, 1883, when its map, diagram and tabular statement was filed with the clerk of the City and County of New York. This right could not be taken away, obtained as it was under its contract to abide by the regulations, limitations, &c., of said contract, and also upon consideration of a money payment for the privilege, without the consent of the relator.

Notwithstanding this right of property and its definite location in the City of New York and under its streets, if the act of 1885 is applicable to the relator, then the relator was required, before it constructed any conduits or opened any streets, and within sixty days after the passage of said act, to present to the Sub-way Commission provided for therein, a plan which said Commission could and would approve.

"Sec. 3. * * * Before any such conduits shall be con- "structed, it shall be necessary to obtain the approval of "said plan of construction so proposed by such com- "pany." * * *

"Sec. 4. * * * ; provided no suitable plan *is proposed* "*or in use* within *sixty days after the passage of this act*, it "shall be the duty of such Board to cause to be devised and "made ready for use such a general plan as will meet the "requirements of said act and of this act, and the Board "*shall have full authority to compel all companies* operat- "ing electric wires to use such subway so prepared in ac- "cordance with the provisions of this act."

Here, then, are provisions which ignore any and all rights which the relator had obtained, impose conditions not ex-

pressed in its contract, and places it at the discretion and will of a Board of Commissioners, which was not bound to accept or approve any plan which the relator had filed with the clerk of the County of New York, or might file with said Board.

It is hardly necessary to say that these provisions of said act, if applied to the relator's contract, impairs it. They in fact ignore the relator's property rights secured by its franchise and definitely located by its map and diagram.

In the case of Green *vs.* Biddle, 8 Wheaton, 1, this Court said:

"The objection to a law on the ground of its impairing "the obligation of contracts can never depend upon the "extent of the change which the law effects in it. Any "diversion of its terms, *by postponing or accelerating* the "period of performance which it prescribes, *imposing con-*"*ditions not expressed in the contract*, or dispensing with "the performance of those that are, however minutely or "apparently immaterial in effect upon the contract of the "parties, impairs its obligation."

In the case of Walker *vs.* Whitehead, 16 Wall., 314, this Court said:

"Any impairment of the obligation of a contract, the *de-*"*gree of impairment is immaterial*, is within the prohibi-"tion of the Constitution."

Now it will be observed that there is no time fixed in the relator's franchise at which it must commence the work of building or constructing its undergound system of electrical wires, cables and conduits; nor is there any time specified within which such work must be completed. The franchise is without limitation as to time, and is in fact perpetual.

Under the provision of said act of 1885, which we last quoted, if this act is to be applied to the relator and its franchise, but sixty days were given either to present a plan for approval to the Board of Subway Commissioners or to put its system into use, and in default of so doing, then

said Board of Commissioners were to devise a plan which would be suitable for all companies desiring to use underground conduits and electrical wires, and said Board was clothed with "*full authority to compel all companies operating "electric wires to use such subway.*"

This provision, we submit, if applied to the relator and its contract, did impair the contract, and for that reason the act should be held unconstitutional.

SECOND.

ABOLISHING AN EXISTING REMEDY FOR THE ENFORCEMENT OF A CONTRACT, WITHOUT SUBSTITUTING AN EQUIVALENT REMEDY THEREFOR, IMPAIRS THE CONTRACT.

The contract between the City of New York and the relator is valid and of the kind and character protected by the Constitution of the United States from impairment by State Legislatures.

People *ex.* O'Brien, 111 N. Y. Rep., 30, 31.
People *ex.* Sturtevant, 9 *id.*, 263;
Milhau *ex.* Sharp, 27 *id.*, 61;
Brooklyn Central R. R. Co. *ex.* Brooklyn City R. R. Co., 32 Barb., 364.

At the time the contract between the City of New York and the relator was entered into, it cannot be questioned that the writ of mandamus, was an existing remedy which the relator was entitled to resort to in case necessity compelled it to do so, and thus formed a part of said contract. It is true that the writ of mandamus is an extraordinary remedy, but nevertheless it is also true that it is a common remedy recognized by the Courts of all of the States for the purpose of compelling municipal officers to do their duty, especially those clothed with ministerial duties.

Louisiana *ex.* Pillsbury, 15 Otto, 278;
Gunn *ex.* Barry, 15 Wall., 610.

By the grant of the franchise to the relator all questions of discretion were ended. The franchise not only is a grant *in presenti*, but it defines the limits and boundaries of said grant, and authorizes the relator, in case of impediments by gas, sewer or water mains, to select other convenient places within the streets of the City of New York to lay its conduits. The right, therefore, to a formal permit to open the streets of said city had been possessed by the relator from April 16th, 1883, to July, 1886, when the relator applied to the defendant for such permit.

It will not be questioned, we think, that but for the act of 1885 referred to, the defendant, as Commissioner of Public Works, would have granted such written permit. The ordinance made a part of the contract, which we have cited, gave to the defendant supervision over the opening of said streets, and a penalty was fixed for opening the same unless by his permit. The refusal of the defendant, as shown by the relator's petition, was based entirely upon the act of 1885.

If said act is applicable to the relator and its contract, which we deny, then the relator was bound to present to the Board of Subway Commissioners provided for therein, for approval, a plan for laying its wires, conduits, &c. Such plan, when presented, might be accepted or rejected, according to the discretion of said Board. There is nothing in the act which defines the kind of plan for laying conduits and electrical conductors which must be accepted by said Board, but, on the contrary, the act leaves it entirely to the discretion of said commission, and gives it unlimited power to approve or reject any plan offered. The act does not stop there, but it provides that, in case a plan such as the Board might see fit to approve was not presented within sixty days after the passage of the act, "it shall be the duty of "such Board to cause to be devised and made ready for use "such a general plan as will meet the requirements of said "act and of this act, and the Board shall have full authority "*to compel all companies operating electric wires to use such sub-*

"*way so prepared in accordance with the provisions of this act.*"

There is nothing in the Act of 1885 which recognizes the rights of the relator, nor is there anything in said act which provides for any proceeding, process, or remedy in any court by which said board might be compelled to accept a suitable plan if it did not desire to accept it.

The writ of mandamus, therefore, was excluded from said act, because the discretion and judgment of a municipal officer will never be controlled by any court. Every municipal officer charged with a duty which involves his discretion and judgment, is free to exercise such discretion and judgment independent of all courts. It is not necessary to cite authorities on this subject, because the rule is too well understood and recognized.

As we have stated, at the time the relator made its contract with the City of New York the writ of mandamus was a right to which the relator was entitled, to compel the defendant, if he refused, to give it a written permit to open the streets, in accordance with its map, diagram and tabular statement, whenever the relator should be ready to commence active operations.

The right to this writ, to enforce its rights under the contract, if the act is applicable to the relator's contract and franchise, by this act, is taken away, and thereby the contract of the relator is impaired.

In the case of Louisiana *vs.* St. Martin's Parish, 111 U. S., 716, this Court, by Mr. Justice Field, said:

"By the obligation of a contract, is meant the means "which, at the time of its creation, the law affords for its "enforcement. The usual mode by which municipal bod-"ies obtain their funds to meet their pecuniary engage-"ments is taxation. Accordingly, when a contract is made "upon the faith that taxes will be levied, legislation repeal-"ing or modifying the taxing power of the corporation so "as to deprive the holder of the contract *of all adequate* "*and efficacious remedy* is within the constitutional inhi-"bition."

In the case of Walker *vs.* Whitehead, 16 Wall., 314, this Court said:

"The Constitution of the United States declares that "no State shall pass a law 'impairing the obligation of "'contracts.' These propositions may be considered con- "sequent axioms in our jurisprudence. The laws which "exist at the time or place of making a contract, and "where it is to be performed, enter into and form a part "of it. These embrace alike those which affect its val- "idity, construction, discharge and enforcement. Noth- "ing is more material to the obligation of a contract "than the means of its enforcement. The ideas of valid- "ity and remedy are inseparable, and both are parts of "the obligation which is guaranteed by the Constitution "against impairment; the obligation of a contract 'is the "'law which binds the parties to perform their agreement;' "*any impairment of the obligation of a contract, the degree of "impairment is immaterial*, is within the prohibition of the "Constitution. *The State may change the remedy, provided "no substantial rights secured by the contract are impaired, and "whenever such result is produced by the act in question, to that "extent it is void.* The States are no more permitted to impair "the effect of a contract in this way than to affect its valid- "ity in any other manner. Against all assaults coming "from that quarter, whatever guise they may assume, the "contract is shielded by the Constitution. *It must be left "with the same force and effect, including the substantial means "of enforcement* which existed when it was made. The "guarantee of the Constitution gives it protection to that "extent."

Van Hoffman *vs.* Quincy, 4 Wall.;
Green *et al. vs.* Biddle, 8 Wheaton, 1;
Railway Company *vs.* Minnesota, 134 U. S., 418;
Louisiana *vs.* Pillsbury, (*supra*);
Louisiana *vs.* City of New Orleans, 12 Otto, 203.

The act of 1885, if it be given force and applied to the

relator, deprives the relator of any remedy to enforce its contract. An ordinary suit against the City of New York, or against any officer thereof, would be entirely inadequate and unavailing, because whatever judgment might be obtained in such suit, the amount would be wholly inadequate to satisfy the injury done the relator.

We submit, therefore, that the act of 1885, if applied to the relator, is unconstitutional, because it leaves the relator without a legal remedy to enforce its contract, and thereby impairs it.

III.

THE COURT ERRED IN HOLDING THAT THE ACTS OF THE LEGISLATURE OF THE STATE OF NEW YORK OF 1885 AND 1886, EXHIBITS C AND D, REC. FOLS. 16–24, ARE VALID, AS APPLIED TO THE RELATOR'S CONTRACT AND FRANCHISE, BECAUSE SAID ACTS PROVIDE FOR THE TAKING AWAY OF THE RELATOR'S RIGHTS UNDER ITS FRANCHISE WITHOUT DUE PROCESS OF LAW.

First.

Property Cannot be Taken Away from the Owner without Due Process of Law.

The relator, by its franchise, acquired a property right, in the nature of a freehold estate, in perpetuity in the streets, avenues, highways and public places of the City of New York.

People *vs.* O'Brien (*supra*), and cases cited therein.

This right of property became fixed and certain on May 18th, 1883, when the relator filed its map, diagram and tabular statement with the Clerk of the County of New York, in accordance with the ordinance of said city, dated December 14th, 1878. (Exhibit B, Rec. fols. 14–16.)

Van Wyck *vs.* Knevals (*supra*).

The construction put upon the acts of 1885 and 1886 by the Court, renders the relator's property rights in said city subject to the discretionary power of a Board of Subway Commissioners provided for in the act of 1885, from whose decision there is no appeal.

No provision was made in the act of 1885 for a judicial inquiry into the rights of the relator, under its franchise, to ascertain what such rights were according to the decisions of the courts, but, on the contrary, as said acts were construed by the Court, the approval of the Board of Subway Commissioners, created by the act of 1885, of the relator's plans for laying its wires, cables and conduits under the streets, avenues and highways of said city, was made obligatory, in order to entitle it to the formal permit requested of the defendant.

That the decision of the Board of Subway Commissioners, provided for in the act of 1885, is final and conclusive as to the plan to be adopted and used, we call attention to Sec. 4 of the act of 1885 (Rec. fols. 17 and 18, pp. 11 and 12), in which it is made the duty of said Board to investigate any and all methods proposed to it, and then it is further enacted as follows: "*Provided no suitable plan is proposed or* "*in use within sixty days after the passage of this act, it shall be* "*the duty of such board to cause to be devised and made ready* "*for use such a general plan as will meet the requirements of* "*said act and of this act, and the Board shall have full au-*"*thority to compel all companies operating electric wires to use* "*such subway so prepared in accordance with the provisions of* "*this act.*"

Thus it will be seen that the Board of Subway Commissioners was not only made the final judge of what should constitute a "suitable plan," but was also clothed with authority to devise a plan if the plans submitted to it were not, for any reason whatever, by it deemed suitable, and in case it did devise a plan, said Board was given absolute power to compel all companies, including the relator, to use the one prepared by it.

We submit that this act, as construed by the Court, does take away the relator's vested right of property without due process of law, and leaves such rights at the will and caprice of a Commission, clothed with absolute power to approve or reject any plan submitted to it and to compel the relator to use the plan it might devise instead of the plan devised by the relator.

Depriving an owner of property of "a judicial investiga-"tion, by due process of law, under the forms and with the "machinery provided by the wisdom of successive ages for "the investigation judicially of the truth of the matter in "controversy, and substituting therefor, as an absolute "finality, the action of a * * * Commission," is depriving him of his property within the Constitutional limitation.

Chicago, M. & St. P. R. Co. *vs.* State of Minnesota, 134 U. S., 418;
Ries *vs.* City of Watertown, 19 Wall., 107;
Westervelt *vs.* Gregg, 12 N. Y., 202;
People *vs.* Essex Co., 70 N. Y., 229.

IV.

THE COURT ERRED IN HOLDING THAT THE ACTS OF 1885 AND 1886, (EXHIBITS C AND D, REC., FOLS. 16-24), ARE PROPER POLICE REGULATIONS, AND WERE PASSED IN THE DUE EXERCISE OF THE POLICE POWER OF THE STATE.

First.

Statutes Passed as Police Regulations Must Not Impair Contracts.

We shall not deny that a State has a right to pass laws to secure good order, to protect the morals, and secure the health and safety of the people of the State. Such right is undoubtedly inherent in a State, and constitutes a part of her sovereignty. There is, however, a limit to which the

police power, or the claim of police power, of a State can go, and that limit is reached when, by the exercise, or attempted exercise of such power, rights secured by contracts are invaded. A State must not pass laws which shall violate or impair the validity of contracts.

In the case of the New Orleans Gas Light Company *vs.* Louisiana, &c., Manufacturing Company, 115 U. S., 650, Mr. Justice Harlan, in delivering the opinion of the Court, said:

"Definitions of the police power must, however, be taken "subject to the condition that a State cannot in its exer- "cise, *for any purpose whatever*, encroach upon the powers "of the General Government, *or rights granted or secured by* "*the supreme law of the land.*"

Bridge Proprietors *vs.* Hoboken Company, 1 Wall., 116;

Chenango Bridge Company *vs.* Binghampton Bridge Company, 3 Wall., 51.

In the latter case this Court, speaking through Mr. Justice Davis, said:

"We have supposed, if anything was settled by an un- "broken course of decisions in the Federal and State "Courts, it was that an act of incorporation was a contract "between the State and the stockholders. All Courts at "this day are estopped from questioning the doctrine. The "security of property rests upon it, and every successful "enterprise is undertaken in the unshaken belief that it "will never be forsaken.

"A departure from it would involve dangers to society "that cannot be foreseen, would shock the sense of justice "of the country, unhinge its business interests, and weaken, "if not destroy, all respect which has always been felt for "the Judicial Department of the Government. An at- "tempt even to reaffirm it could only tend to lessen its "force and obligation. * * * It was well remarked by "the Chief Justice in the Dartmouth College case, 'that

"'the objects for which a corporation is created are univer-
"'sally such as the Government wishes to promote. They
"'are deemed beneficial to the country, and this benefit
"'constitutes the consideration, and, in most cases, the sole
"'consideration for the grant.' The purposes to be at-
"tained are generally beyond the ability of individual
"enterprises, and can only be accomplished through the
"aid of associated wealth. This will not be risked unless
"privileges are given and securities furnished in an act of
"incorporation. * * * The Legislature, therefore, says
"to public spirited citizens: 'If you will embark with your
"'time, money and skill in an enterprise which will ac-
"'commodate the public necessities, we will grant to you,
"'for a limited period or in perpetuity, privileges that will
"'justify the expenditure of your money and the employ-
"'ment of your time and skill.' Such a grant is a contract
"with mutual considerations, and justice and good policy
"alike require that the protection of the law should be as-
"sured to it."

West River Bridge Company *vs.* Dix, 6 How., 531;
Morgan's R. R. & Steamship Company *vs.* Louisiana, 115 U. S., 455;
Wyndhamer *vs.* People, 13 N. Y., 378;
People *vs.* Jacobs, 93 N. Y., 99.

The petition of the relator in this case discloses a state of facts like those mentioned in the case of the Chenango Bridge Company *vs.* Binghampton Bridge Company (*supra*). Immediately upon obtaining its franchise, the relator commenced to expend money, and did expend a large sum of money, for the purpose of preparing itself to carry out the undertaking upon which it had entered. On the faith of its franchise a portion of its stock was sold, the purchasers believing that by such purchases they were securing that which was valuable, and in the future development of the enterprise would be more valuable. The persons who thus spent their time and invested their money in this enterprise are

entitled to protection, and the question in this case is, shall they be protected, or shall their efforts and money be lost by a construction of the acts of 1885 and 1886 which holds that those acts are simply the proper exercise of the police power of the State?

We submit that such a decision is in violation of the Constitution of the United States and in violation of the rights which are secured thereby.

SECOND.

STATUTES PASSED UNDER THE POLICE POWER OF A STATE CANNOT TAKE AWAY VESTED RIGHTS.

The record of this case shows that the relator had acquired vested rights in the streets, avenues, highways and public places of the City of New York, before the acts of 1885 and 1886 were passed.

These rights cannot be taken away without the relator's consent.

Brooklyn Central R. R. Co. *vs.* Brooklyn City R. R. Co. (*supra*).

One of the essential features of the relator's rights under its franchise, is the definite location of its lines and routes in the streets of said city.

The map, diagram and tabular statement filed May 18, 1883, with the Clerk of the County of New York fixed the particular "spaces, positions and localities" in the streets of said city, which the relator, under its franchise, is entitled to occupy.

The right to such "spaces, positions and localities" is guaranteed by the sixth clause of the ordinance of December 14th, 1878, (Exhibit B, Rec., fols. 14–16), which ordinance was made a part of the relator's franchise, subject to such changes as may be found necessary, as provided in the second clause of relator's franchise. (Exhibit A, Rec., fols. 13–14.)

If the acts of 1885 and 1886 are held to apply to and include the relator's franchise, the right or title which the relator secured to the "spaces, positions and localities" shown and delineated on its map and diagram, is by said acts taken away and destroyed, and the relator is shorn of that which, under its franchise, was granted and secured to it.

Such destruction of the relator's right and title to the "spaces, positions and localities" secured in and under the streets, avenues and highways of said city, we submit, is beyond the power of the Legislature of the State of New York to accomplish by any act or acts it has or may pass, under the police power of the State.

Fletcher *vs.* Peck, 6 Cranch, 87;
Terrett *vs.* Taylor, 9 Cranch, 43;
Paylet *vs.* Clark, *id.*, 29;
Rice *vs.* Minn. & N.W. R. R. Co., 66.U. S., 147;
People *vs.* Platt, 17 Johnson (N.Y.), 195;
People *vs.* Jacobs, 98 N. Y., 99;
Wynehamer *vs.* People, 13 N. Y., 378.

"Depriving an owner of property of one of its essential attributes, is depriving him of his property within the constitutional limitation."

People *ex rel. vs.* Otis, 90 N. Y. R., 48.

V.

THE COURT ERRED IN NOT GRANTING THE WRIT OF MANDAMUS AGAINST THE DEFENDANT, AS PRAYED, NOTWITHSTANDING THE ACTS OF THE LEGISLATURE OF THE STATE OF NEW YORK OF 1885 AND 1886, EXHIITS C AND D, REC., FOLS. 16 TO 24.

The franchise which the relator obtained from the City of New York, through its proper officers, granted to it a present right to open the streets of said city for the purposes

named in said franchise. The record shows that the relator had complied with all the conditions and requirements named in the franchise before it applied to the defendant for a written permit to open said streets.

The relator, therefore, had a right to make the request it did, and it was the duty of the defendant to grant the permit to the relator whenever the request was made.

By the fourth clause of the ordinance of December 14th, 1878, the conditions of which were to be observed by the relator, it is provided:

"The work of removal and replacement of the pavement "in any and all of the streets, avenues, highways and pub- "lic places in and through which the wires of any telegraph "company shall be laid, shall be subject to the control and "supervision of the Commissioner of Public Works. Ex- "cavations in any and all of the unopened streets, avenues, "highways or public places, shall also be subject to like "control and supervision." (Rec., fol. 15, p. 10.)

By Paragraph VI of the relator's petition it appears that the following ordinance, adopted by the Mayor, Aldermen and Commonalty of the City of New York, is still in force:

"No pavement in any street of the City of New York, "which has been accepted by the corporation to be kept in "repair at the public expense, shall hereafter be taken up "or the paving stones removed therefrom for any purpose "whatever, without the authority of the Department of "Public Works, under the penalty of one thousand dollars "for every offence."

While the relator had a present right to commence operations when it made its request to the defendant, still it could not proceed without a formal permit from him. The defendant could not grant the *right* to the relator to open the streets of said city, but he was the officer designated in the ordinances of said city, under whose supervision such work was to be done The issuing of such permit by the defendant was simply a ministerial duty, a duty requiring no discretion on his part. In the franchise the grant is general,

to open all of the streets of said city, but, under the ordinance, the relator could not proceed to open any of said streets without the formal permit of the defendant, without incurring a penalty of one thousand dollars for every offence.

In the decision of the Court of Common Pleas it is stated as follows:

"It is to be noted that it does not appear that the relator "ever filed with the Board of Commissioners of Subways "any maps or plans pursuant to the Act of 1885, or ever "sought to obtain the approval of said Board of any "plans of construction proposed by it, or if any such plans "were filed, it does not appear that the Board carefully "investigated such plans, as required by section 4 of the "Act of 1885. On the other hand, it appears that the rela-"tor sought to convince the Commissioners, *and did con-"vince them*, that Chapter 499 of the Laws of 1885 did not "apply to it." (Rec., fols. 32–33.)

It thus appears that there was no denial on the part of the Board of Subway Commissioners of the right of the relator to have the permit it requested of the defendant, because said Board was convinced that under the Act of 1885 it had no jurisdiction over the relator and its franchise.

Notwithstanding this fact, the relator was powerless to commence operations without a formal permit from the defendant, and, as appears by the record, the defendant arbitrarily refused to grant such permit, assigning for his refusal that the act of 1885 did not allow him to do so.

Inasmuch as the act of 1885 does not include the relator and its franchise, or is unconstitutional and void, and inasmuch as the defendant had only a ministerial duty to perform in issuing said permit, we submit that the Court erred in denying the petition of the relator, and we further submit that the Court erred in not granting the writ of mandamus, as prayed for, notwithstanding the acts of 1885 and 1886.

For the reasons we have assigned, we submit that the decision of the Court of Appeals of the State of New York sustaining the defendant in his refusal to issue to the relator the formal permit requested, should be overruled; and forasmuch as all of the proceedings of said Court have been returned, together with the record of the case, to the Court of Common Pleas of said State for the City and County of New York, we ask that an order be entered directing said Court to issue to the relator, plaintiff in error, a peremptory writ of mandamus, directed to the Commissioner of Public Works of the City of New York, in accordance with the relator's petition.

E. M. Marble,
Attorney for Plaintiff in Error.

145 U.S. 175

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 185.

THE PEOPLE OF THE STATE OF NEW YORK, *ex rel.* THE NEW YORK ELECTRIC LINES COMPANY,

Plaintiff in Error,

against

ROLLIN M. SQUIRE, as Commissioner of Public Works in and for the City and County of New York,

Defendant in Error.

Brief on Behalf of The Metropolitan Telephone and Telegraph Company.

MELVILLE EGLESTON,
JAMES C. CARTER,
Of Counsel.

C. G. Burgoyne, Walker and Centre Sts., N. Y.

In the Supreme Court of the United States.

OCTOBER TERM, 1891.

THE PEOPLE OF THE STATE OF NEW YORK EX REL. THE NEW YORK ELECTRIC LINES COMPANY,
Plaintiff in Error,

AGAINST

No. 185.

ROLLIN M. SQUIRE, as Commissioner of Public Works in and for the City and County of New York,
Defendant in Error.

IN ERROR TO THE COURT OF COMMON PLEAS FOR THE CITY AND COUNTY OF NEW YORK.

Brief on Behalf of The Metropolitan Telephone and Telegraph Company.

Counsel do not now propose to controvert the proposition that whatever rights the plaintiff in error may have acquired are subject to the police power of the State, nor to contend that upon the whole case the judgment in the State Court in this action ought not to be affirmed.

But they do most earnestly depreciate any decision by this Court of one question made and discussed in the brief of counsel for the defendant in error, unless a decision of it should be deemed necessary. That question arises upon the point made in the brief that the relator could take, by the acts under which it was incorporated, no right in the public streets, save a mere license, and that such license has not the qualities of a contract, but is revocable at any time at the pleasure of the State. The Metropolitan Telephone and Telegraph Company, and many other similar corporations, have a vital interest in this question, and it might be unfortunate for them to have it decided in suits they were not parties. They insist that the right of telegraph companies organized under the laws of the State of New York, authorizing the formation of such companies, to maintain the lines, which, upon the faith of their charters, they have, at great expense, constructed in the public streets and highways of the State, is a right of which they cannot be capriciously deprived, and with which the State cannot interfere, except in the legitimate exercise of its police power or the right of eminent domain. The grant of such right by the State is invested with all the qualities of a contract, which therefore may not be impaired by State legislation; and the right itself is property protected by the provisions of the Federal Constitution.

The consent of counsel for the defendant to the filing of this brief is in the form of a communication to the Court, and contains the following statement:

"We" (counsel for defendant in error) "would, with the permission of the Court, withdraw so much of our argument as is to the effect that such companies have only a revocable license; only insisting that their rights, whatever they may be, are subject to the exercise of the police power." (See printed consent.)

After such a disclaimer it would not ordinarily seem proper to take the time of the Court in answering the part of the argument thus abandoned, but from the fact that the Court, after the filing of that communication, yet permitted an intervening brief to be handed in upon the point, it is supposed that the Court prefers to have the views of counsel presented.

The laws of the State of New York providing for the incorporation of telegraph companies confer upon such companies certain powers. Among these are the following:

"Such association is authorized to construct lines of telegraph along and upon any of the public roads and highways, or across any of the waters within the limits of this State, by the erection of the necessary fixtures, including posts, piers or abutments, for sustaining the cords or wires of such line" (with certain provisions against incommoding the public use).

Laws of 1848, Chapter 265, Section 5.

By L. 1853, Chapter 471, Section 2, amending the Act of 1848, it is provided that "Such association is authorized to erect and construct, from time to time, the necessary fixtures for such lines of telegraph, upon, over or under any of the public roads, streets, and highways; and through, across or under any of the waters within the limits of this State, subject to the restrictions in the said recited act" (L. 1848, C. 265) "contained."

The provisions of the Acts of 1879, as amended by the act of 1881, are as follows:

"SEC. 1. Any company or companies organized and incorporated under the laws of this State for the purpose of owning, constructing, using and maintaining a line or lines of electric telegraph within this State, or partly within and partly beyond the limits of this State, are hereby authorized, from time to time, to construct

and lay lines of electrical conductors underground in any city, village or town within the limits of this State, subject to all the provisions of law in reference to such companies not inconsistent with this act; provided that such company shall, before laying any such line in any city, village or town of this State, first obtain from the common council of cities, the trustees of villages, or the commissioners of highways of towns, permission to use the streets within such city, village or town for the purposes herein set forth."

The power is given to acquire, by condemnation, if necessary, the interest of owners of the soil.

That such legislation as to any corporation organized under its provisions constitutes a "contract between the State and its corporators, and within the provisions of the Constitution, prohibiting legislation impairing the obligations of contracts," and therefore, protected from legislative interference, seems to be thoroughly settled in this Court by the decisions in the cases referred to in *New Orleans Gas Light Co. vs. Louisiana Light, &c., Mfg. Co.*, 115 U. S., 650.

The opinion in that case disposes of the greater part of the authorities cited in the brief of counsel for the defendant in error upon this point.

The following language of the opinion cited is directly applicable:

"The Legislature further says to public-spirited associations, 'If you will embark with your time, money and skill in an enterprise which will accommodate the public interests, we will grant to you for a limited period or in perpetuity privileges that will justify the expenditure of your money and the employment of your time and skill.' Such a grant is a contract with mutual considerations, and justice and good policy alike require that the protection of the law should be insured to it."

Counsel for defendant, however, question the nature of the right conferred, while the plaintiff apparently

relies upon a right secured by contract with the city. The view here taken differs from those found in either of the briefs already filed.

I.

The acts referred to confer a permanent franchise, which is in its nature property, and as such protected by the Federal Constitution.

1. The language used in the statute is that ordinarily employed by legislatures in granting similar franchises and rights of way in the streets to other classes of corporations engaged in enterprises of a public nature.

Thus, the railroad law in the State of New York provides that a railroad corporation "shall have power * * * to construct its road across, along or upon any stream, watercourse, highway, plank road, turnpike, or across any of the canals of the State which the route of its road shall intersect or touch."

L. 1890 c. 565, Sec. 4.

As to gas companies:

"Every such corporation shall have the following additional powers * * * to lay conductors for conducting gas through the streets, lanes, alleys, squares, and highways in such cities, villages or towns."

L. 1890, C. 566, Article VI., Sec. 61.

As to water companies:

"Every such corporation shall have the following additional powers:

"1. To lay and maintain their pipes and hydrants for delivering and distributing water in any street, highway or public place of any town or one in which it has obtained the permit required by Section 80 of this article."

Id., Art. VII., Sec. 82.

The Act of Congress of July 24th, 1866, Chap. 230, Sec. 1, provides that any telegraph company which shall file its written acceptance with the Postmaster-General of the restrictions and obligations required by law

"Shall have the right to construct, maintain and operate lines of telegraph through and over any part of the public domain of the United States, over and along any of the military or post roads of the United States, which have been or may hereafter be declared such by law, and over, under or across the navigable streams or waters of the United States," &c. No State Legislature can prevent the occupation of post roads for telegraph purposes by such corporations as are willing to avail themselves of its provisions (*Pensacola Tel. Co. vs. W. U. Tel. Co.*, 96 U. S., 1).

That legislative provisions couched in such language confer a franchise, to be exercised in the streets and highways referred to, is, as we conceive, uniformly held, and that such franchises are property of which the grantee cannot be deprived without due process of law seems well recognized and affirmed by many authorities.

N. O. Gas Light Co. vs. Louisiana Light, &c., Co., *supra*;

Chenango Bridge Co. vs. Binghamton Bridge Co., 3 Wall., 51;

Bridge Proprietors vs. Hoboken Co., 1 Wall., 116;

Morgan's Steamship Co. vs. Louisiana Board Health, 118 U. S., 455.

II.

It will be found upon examination that none of the cases cited under the third point of the brief for defendant, when understood, support the contrary view.

The case of Am. Rapid Tel. Co. vs. Hess (125 N. Y., 641), construing the acts under review, holds that the "subway acts" were a proper exercise of the police power and did not impair any contract which the plaintiff might have from the State by virtue of the Acts of 1848 and 1853.

It is true that the Court in that case say:

"We think the Act of 1848, as amended in 1853, can in no proper sense be said to have granted any interests to the plaintiff in the streets of the city. There certainly was no formal grant, and the statutes contain no terms of phraseology appropriate to a grant. They, at most, confer upon the plaintiff an authority or license to enter upon the streets for its purposes and subject to certain conditions" (p. 645).

But this is very far from saying that the acts could not operate as a grant of a franchise to use the streets. Assuming that the statutes did not contain terms or phraseology appropriate to a grant of interest in the streets, they certainly did contain precisely such phraseology as is ordinarily used in conferring such a public franchise in the streets and highways, as we have seen above. What the Court sought to exclude was the idea that telegraph companies by virtue of those acts acquired an *interest in the streets;* in other words, it did not desire to admit that telegraph companies operating lines in the streets of the city owned any specified part of the street. We think, indeed, the Court went too far in holding that the language was not sufficient to grant *any* technical

interest in the streets. The language of the opinion in this respect seems to be inconsistent with that held by the same Court in the case of *People vs. O'Brien*, 111 N. Y., 30, where it is said that the company "took an estate in perpetuity through its grant from the city under the authority of the Constitution and the Legislature;" and in the case of *Milhau vs. Sharp*, 27 N. Y., 611, where the Court said, as to the franchise in question in that case, "it amounted to an immediate grant of an interest, and it would seem of a freehold in the soil of the street to defendants."

It would seem that there could be no substantial distinction made between a franchise obtained by a street surface railroad company and that obtained by a telegraph company to maintain and operate its system in the streets of the city. That the grant was from the city, which held the streets in trust for street purposes, is hardly sufficient to distinguish the cases. The trust of the city being *publici juris*, it is under the unqualified control of the Legislature. "If the Legislature could not authorize the use of the streets in the way prescribed in the Act of 1860 (for street railway) the power exists nowhere. The permission of the municipal government, the mere creature existing at the will of the State, would add nothing to the power" (*People vs. Kerr*, 27 N. Y., 213). The franchises of telegraph companies are classed with those of railroad, canal, gas, water and similar companies in this very case (*People vs. O'Brien, supra*, p. 47).

Moreover, the language of these decisions in the 125 and 126 N. Y. Reports seems inconsistent with the decision of the same Court in the case of *Am. Un. Tel. Co. vs. Middleton*, 80 N. Y., 428, where it is held that a telegraph line in the public highway is real estate for all purposes.

In *The People vs. Dolan*, 126 N. Y., 166, the Court reiterated its view (thereby interpreting its language) in the case of *Am. R. Tel. Co. vs. Hess*, saying: "We

have held in American Rapid Telegraph Company vs. Hess (125 N. Y., 641) that a telegraph company organized under the Act of 1848, and obtaining from it the right to construct its lines of telegraph upon the public streets or highways, acquired no absolute interest in the highway or the land, and that it was subject to the police power of the State, wielded through its municipal agencies, which could direct the lines to be taken down and placed in subways provided for them."

"This interest in the land or in a street is in reality nothing more than a license granted by the State. In the language of the act it is an authority to construct lines along and upon the public roads and highways. This license may also be revoked by legislative enactment."

But, if so, only under limitations, and in accordance with principles established by this Court.

In that case, the question and the only question to be determined, so far as it has any bearing upon this case, was the question of the value of the interest in the land in which a pole is placed in a public street by a telegraph company. The defendant was a tax assessor, and the case was before the Court on *certiorari*, brought to review the assessment. The case merely held that there was no title whatever in the company to the land thus used, and it was held, therefore, that there was nothing to be taxed, except the physical structure, which was not to be regarded as part of a whole, nor as a complete telegraph line in operation, but that its value for telegraph purposes and its position with its connections and its productive capacity were not considerations entering into the value of the property under the act.

The Court was very far, however, from deciding in that case that the company had no franchise in the streets. It simply said that the value of such franchise was to be assessed under another act (C. 561 of the Laws of 1881), by which certain corporations, and

among them telegragh companies, are taxed upon their corporate franchises or business. In other words, the Court held that, in accordance with the system of taxation established by the laws of the State of New York, the lines were subject to local taxation upon the value of the poles and wires without reference to their value as parts of a going concern, whereas everything which gives to those poles a special value, including the right to maintain and operate them in the streets and highways, was to be taxed for State purposes under another law, which professes to impose a tax upon the business and franchises of the company.

There is nothing in either of these cases to warrant the inference that the Acts of 1848 and 1851 did not confer franchises upon corporations acting upon their provisions, or that such franchises differed in any way as to permanence, revocability or in the binding force of the legislative contract by which they were acquired from like franchises conferred upon other classes of corporations engaged in enterprises of a public nature.

It has been held, as we have shown, that such franchises were property, and that companies which have once acquired them have a vested right in them of which they cannot be deprived.

See cases cited under I, *supra*.

The cases cited by the defendant holding that the State in granting a license had made no contract (*Stone vs. Mississippi*, &c.), have no bearing upon this case.

"The principle upon which the decisions in *Beer Co. vs. Massachusetts*, *Fertilizing Co. vs. Hyde Park*, *Stone vs. Mississippi*, *and Butchers' Union Company vs. Crescent City Live Stock*, &c., *Co.*, rest, is that one Legislature cannot so limit the discretion of its successors that they may not enact such laws as are necessary to protect the public health or the public morals." That principle, it may be observed, was announced with

reference to particular kinds of private business which, in whatever manner conducted, were detrimental to the public health or the public morals (*N. O. Gas Light Co. vs. Louisiana Light, &c., Co., supra*). The present case involves no such considerations.

Telegraphy by means of lines constructed in or under the streets of a city is not an ordinary business in which everyone may engage, but is a franchise belonging to the Government to be granted for the accomplishment of public purposes to whomsoever and upon whatever terms it pleases.

Like the manufacture and distribution of gas, "it is a business of a public nature and meets a public necessity for which the State may make provision. It is one which, so far from affecting the public injuriously, has become one of the most important agencies of civilization for the promotion of public convenience and public safety." It has "become one of the necessities of commerce and is indispensable as a means of intercommunication."

Pensacola Tel. Co. vs. W. U. Tel. Co., *supra*.

Most of the cases cited by defendant have as little application to the case in hand.

All the cases cited under the sixth subdivision of the defendant's third point, except one, relate to licenses to use the streets of a city or a navigable stream for purely private purposes.

The case of *Cincinnati Inclined Plane R. R. Co. vs. City and Suburban Tel. Ass.*, cited there and elsewhere in the brief, held that the franchises granted to the telegraph company did not give such an exclusive right to the use of the streets as would prevent the granting of a franchise for electric railway in the same street. What is said *obiter* as to the effect of the reserved right of repeal or amendment is in conflict with the law as laid down by this Court, as well as by the Courts of New York.

III.

The reserved right to repeal or amend cannot affect such rights as are here under consideration.

The power to repeal the charter of a corporation cannot upon any legal principle include the power to repeal what is in its nature irrepealable, or to undo what has been lawfully done under power lawfully conferred.

The decision of the New York Court of Appeals in *People vs. O'Brien*, *supra*, considers this point very fully, and seems to cover the case so far as the courts of that State are concerned, and the principle has been over and over again affirmed in the strongest manner by this Court.

The Court in *People vs. O'Brien* hold that the Constitution provides for the amendment and repeal of statutes alone. The provision that "the charter of every corporation that shall be granted by the Legislature shall be subject to alteration, suspension and repeal in the discretion of the Legislature" is statutory only (R. S., c. 18, § 8, Title 3). There is no reference to this reservation in the telegraph laws. Whether, therefore, the grant of power is subject to such reservation is a question of intent.

New Jersey vs. Yard, 95 U. S., 104.

And it is submitted that in the statutes there is no indication of such intent, but that the contrary is evident from the nature of the rights conferred.

The mere fact that the power of eminent domain is delegated in aid of the franchise would seem conclusive.

In any case the reservation can have no effect to override the provisions of the Federal Constitution.

In the New York case above cited the Court say further that "in none of the provisions for repeal in this State is there anything contained which purports

to confer power to take away or destroy property or to annul contracts," and, again :

" The authorities seem to be uniform to the effect that a reservation of the right to repeal, enables a Legislature to effect a destruction of the corporate life, and disable it from continuing its corporate business " (citing cases), " and a reservation of the right to alter and amend confers power to pass all needful laws for the regulation and control of the domestic affairs of a corporation, freed from the restrictions imposed by the Federal Constitution upon legislation impairing the obligation of contracts. (Munn vs. Illinois, 94 U. S., 113, 123.) "

" We think no well considered case has gone further than this, while in many cases such power has been expressly held to be limited to the effect stated." * * *

" It would seem to be quite obvious that a power existing in the Legislature by virtue of a reservation only, could not be made the foundation of an authority to do that which is expressly inhibited by the Constitution."

The effect of such a reservation (assuming that it here exists, although it is by no means admitted) is well settled in this Court.

Sinking Fund cases, 99 U. S., 700.
Fletcher vs. Peck, 6 Cranch, 47.
Shields vs. Ohio, 95 U. S., 324.
Miller vs. State, 15 Wall., 478.

IV.

If our views as here presented are correct, it appears from an examination of the acts under which telegraph companies are organized in the State of New York, that such companies, to the extent that the powers conferred by those acts are accepted and acted upon, may

acquire franchises to be exercised in the streets and highways within the limits of that State, which franchises are held by virtue of a contract with the State. These franchises are inseparably united with the real estate and fixtures necessary for their enjoyment, and are beyond the reach of legislative interference, save in the legitimate exercise of the police power of the State and the right of eminent domain.

"Rights and privileges arising from contracts with a State are subject to regulations for the protection of the public health, the public morals and the public safety in the same sense and to the same extent as are all contracts and all property, whether owned by natural persons or corporations."

N. O. Gas Light Co. vs. La. Light, etc., Co., *supra*.

With such limitation of the rights of telegraph companies to the enjoyment of the franchises acquired by them from the State they may well be content. Other limitations of those rights cannot, it is submitted, be imposed by legislative authority upon any pretext.

MELVILLE EGLESTON,
JAMES C. CARTER,
Of Counsel.

FEB 27 1892
JAMES H. McKENNY
CLERK

[REG. 36, FOL. 154.]

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 185.

THE PEOPLE OF THE STATE OF NEW YORK, *ex rel* THE NEW YORK ELECTRIC LINES COMPANY, PLAINTIFF IN ERROR,

against

ROLLIN M. SQUIRE, AS COMMISSIONER OF PUBLIC WORKS IN AND FOR THE CITY AND COUNTY OF NEW YORK, DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

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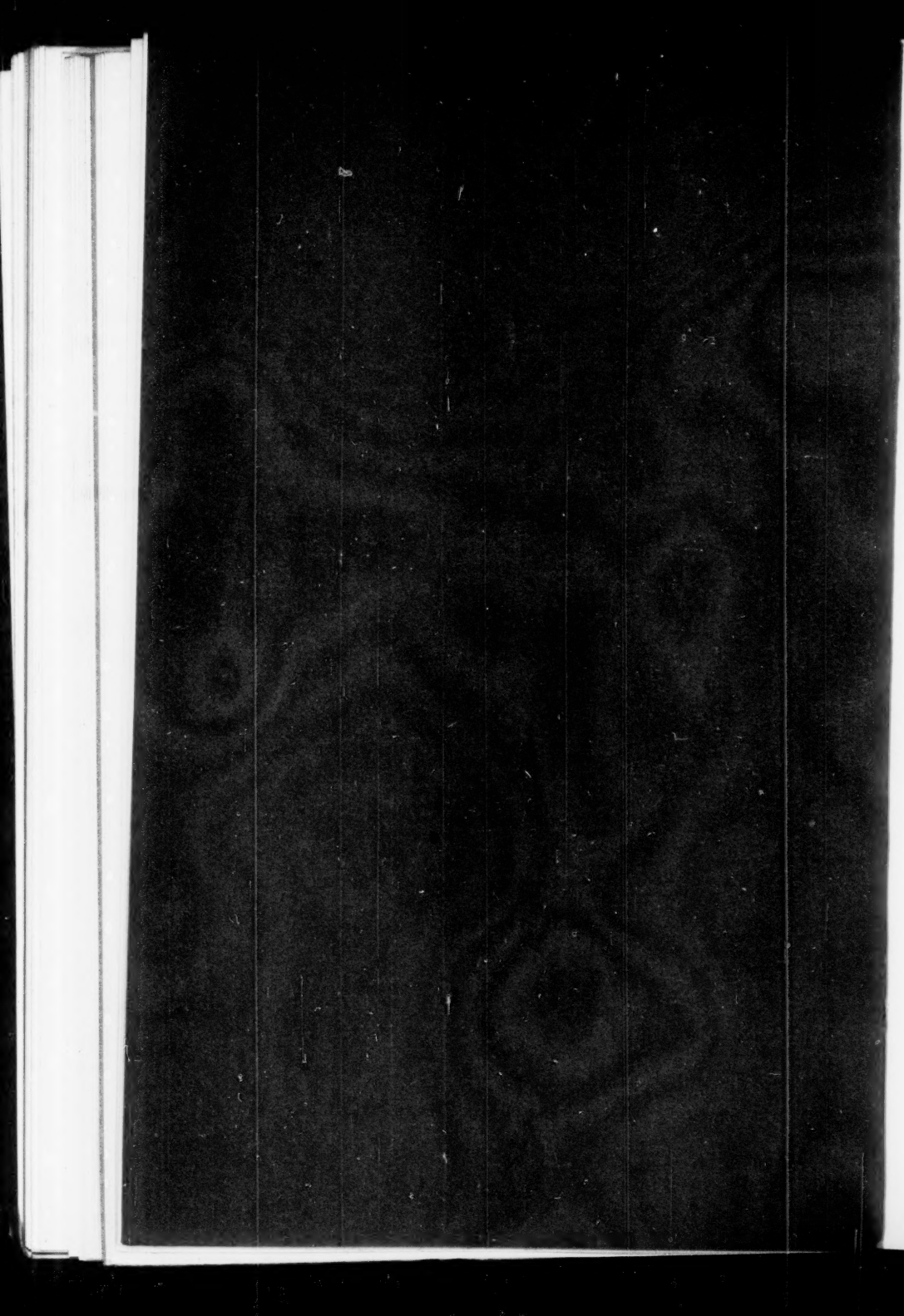

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ROLLIN M. SQUIRE, AS COMMISSIONER OF PUBLIC WORKS IN AND FOR THE CITY AND COUNTY OF NEW YORK, DEFENDANT IN ERROR.

IN ERROR TO THE COURT OF COMMON PLEAS FOR THE CITY AND COUNTY OF NEW YORK.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

This is a writ of error sued out by the plaintiff in error, The People of the State of New York *ex rel.* The New York Electric Lines Company to the Supreme Court of the United States to reverse a judgment of the Court of Common Pleas for the City and County of New York, entered January 20, 1888, establishing as its judgment the judgment of the Court of Appeals of the State of New York, rendered January 17, 1888, affirming the order of the General Term of the said Court of Common Pleas herein entered April 28, 1886, which in turn affirmed the order of the Special Term of said Court of Common Pleas herein entered October 22, 1886, denying

the application of the relator for a writ of peremptory mandamus to compel the Commissioner of Public Works in and for the City and County of New York to issue a permit, allowing the relator to take up the pavement and open the streets of the City of New York for the purpose of laying therein the conductors of the relator.

The relator was incorporated on or about the 14th day of October, 1882, under the General Telegraph Act of the State of New York (passed April 12, 1848, being chapter 265 of the Laws of 1848), and the several acts amendatory thereof and supplementary thereto (See certificate of incorporation; Record, top pp. 5, 6 and 7) "for the purpose of owning, constructing, using, maintaining and "leasing, lines of telegraph wires or other electric conductors for "telegraphic and telephonic communication, and for electric illumi-"nation, to be placed *under* the pavements of the streets, avenues "and public highways of the cities of New York and Brooklyn, in "the State of New York, and *under* the sidewalks of the streets and "avenues of the said cities, and upon, over or under private lands "in the said cities, within blocks of buildings erected or to be erected "therein; and for the purpose of owning franchises for laying and "operating the said lines of electric conductors, and the purchas-"ing, owning and disposing of such real estate within the said cities; "and such personal property as may from time to time be necessary "and convenient to the building, using, maintaining and leasing "the said lines of electric conductors" (*Ibid*, top p. 5).

The General Telegraph Act of 1848, above referred to, entitled "An Act to provide for the incorporation and regulation of telegraph companies," provides as follows:

"§ 4. Such association [*i. e.*, the telegraph company hereinbefore "specified] is authorized to construct lines of telegraph along and "upon any of the public roads and highways, or across any of the "waters within the limits of the State [*i. e.*, the State of New York], "by the erection of the necessary fixtures, including posts, piers or "abutments, for sustaining the cords or wires of such lines; *pro-"vided* the same shall not be so constructed as to incommode the "public use of said roads or highways, or injuriously interrupt the "navigation of said waters; nor shall this act be so construed as to "authorize the construction of any bridge across any of the waters "of this State."

Chapter 471 of the Laws of the State of New York, entitled, "An Act to amend an act 'An Act to provide for the incorporation "and regulation of telegraph companies,' passed April 12, 1848," passed June 29, 1853, enacts as follows:

"§ 2. Such association [*i. e.*, the telegraph company hereinbe-"fore specified] is authorized to erect and construct, from time to "time, the necessary fixtures for such lines of telegraph, upon, "over or *under* any of the public roads, streets and highways; and "through, across or under any of the waters within the limits of "this State, subject to the restrictions in the said recited act

" contained [see them, *supra*] ; and also to erect and construct such " fixtures upon, through or over any other land, subject to the right " of the owner or owners thereof to full compensation for the " same."

Chapter 483 of the Laws of the State of New York, entitled, " An Act to amend chapter three hundred and ninety-seven of the " Laws of eighteen hundred and seventy-nine, entitled, ' An Act to " provide for the laying of telegraph wires underground,' " passed June 10, 1881, enacts as follows:

" SECTION 1. Chapter three hundred and ninety-seven of the Laws " of eighteen hundred and seventy-nine, entitled, ' An Act to pro- " vide for the laying of telegraph wires underground,' is hereby " amended so as to read as follows:

" § 1. Any company or companies organized and incorporated " under the laws of this State for the purpose of owning, construct- " ing, using and maintaining a line or lines of electric telegraph " within this State or partly within and partly beyond the limits of " this State, are hereby authorized, from time to time, to construct " and lay lines of electrical conductors *underground* in any city, " village or town within the limits of this State, subject to all the " provisions of law in reference to such companies not inconsistent " with this act ; *provided* that such company shall, before laying any " such line in any city, village or town of this State, first obtain " from the common council of cities, the trustees of villages, or the " commissioners of highways of towns, *permission* to use the streets " within such city, village or town for the purposes herein set " forth."

A perusal of the relator's certificate of incorporation hereinbefore quoted and of the statutory enactments hereinbefore quoted —the sole foundation of the relator's corporate power—makes it apparent that the relator derives through its corporate powers no exclusive rights, privileges, immunities or franchises in *express* terms.

It needs no argument to show that.

On or about April 10, 1883, the Board of Aldermen of the City of New York, adopted over the Mayor's veto, resolutions in these words:

" *Resolved*, That permission be and hereby is granted to the " New York Electric Lines Company to lay wires or other conduc- " tors of electricity in and through the streets, avenues and high- " ways of New York City, and to make connections of such wires or " conductors underground by means of the necessary vaults, test- " boxes and distributing conduits, and thence above ground with " points of electric illumination or of telegraphic or telephonic " signal in accordance with the provisions of an ' ordinance to regu- " ' late the laying of subterranean telegraph wires and electric " ' conductors in the streets of the city,' passed by the Common

"Council and approved by the Mayor, December 14, 1878; *provided*, "however, and it is hereby ordained and

"*Resolved*, That whenever the said New York Electric Lines "Company, in the progress of laying its lines of electric conductors, "shall be prevented or obstructed from placing its wires in the "spaces which may have been selected under the ordinance passed "and approved as aforesaid, by manholes of *sewer, gas, steam or* "*water mains*, or other underground or pavement impediments, now "and heretofore existing, then and in such cases the said company, "may, under the privileges hereby granted, vary the space selected, "by adopting, appropriating, and using equivalent and nearest "practicable spaces as may be found necessary"; and *provided* "*further*, and it is hereby further

"*Resolved and Ordained*, That the connection vaults or test "boxes afore mentioned, may be extended underground not "more than four feet in depth or two feet in any lateral direction "*beyond the limited spaces contemplated for the lines of wires in* "*the ordinance passed and approved as aforesaid* [viz., the ordin- "ance of December 14, 1878, *supra*] and may be fitted with covers "or other means of access at the level of the pavements of the "several streets and avenues.

"*Resolved*, That in addition to the requirements and provisions "to be observed, contained in the said ordinance, the said New "York Electric Lines Company, as a further compensation for "the opening and use of the streets of the city, shall pay into "the City Treasury, within ten days after taking up the pave- "ments for each one thousand feet in length of trench to be ex- "cavated, *the maximum sum or sums of money which have been or* "*which may hereafter be required of grantees or licensees to be paid,* "*under any general or special ordinances of the Common Council here-* "*tofore enacted, authorizing the laying of electric conductors under the* "*streets of the city.*

* * *

(Record, pp. 8 and 9.)

The Ordinance of December 14, 1878 (*supra*), provides *inter alia* that

"No telegraph line or electric conductor shall be laid under the "streets of this city at such depth from the surface that the neces- "sary excavation incident to laying or repairing the same shall ex- "pose or endanger any *water or gas pipes, sewers or drains or any* "*parts thereof.*

* * *

"The work of removal and replacement of the pavements in any "and all of the streets, avenues, highways and public places in and "through which the wires of any telegraph company which shall be "laid, shall be subject to the control and supervision of the Com- "missioner of Public Works. Excavations in any and all of the un-

"opened streets, avenues, highways or public places shall also be "subject to like control and supervision.

* * *

"Grantees under this ordinance shall be required within six "months after such permission shall be granted to file with the "County Clerk maps, diagrams and tabular statements, including "the amount and position of the spaces proposed to be occupied by "them and their rights and privileges under this ordinance shall "be confined to the spaces, positions and localities as indicated by "said maps, diagrams and statements."

* * *

(Record, pp. 9 and 10.)

The petition avers, and for the purpose of this argument it must be assumed to be true, that on April 16, 1883, the relator accepted this grant, franchise, privilege or license, whatever may be the legal effect thereof, and agreed to, assumed and obligated itself in the observance of all the requirements, provisions, restrictions, conditions and limitations contained in the resolutions of April 10, 1883 (*supra*), as well also, as to the provisions, conditions and obligations of the ordinance of December 14, 1878 (*supra*).

(Record, pp. 7 and 8.)

Whatever may be the legal effect of the union of these resolutions and this ordinance and this acceptance it needs no argument to show that they gave in express terms to the relator no exclusive rights, privileges, immunities or franchises whatever. On the contrary, the rights of water, gas, sewer, steam companies and other companies of a character similar to relator's are carefully guarded.

The petition (Record, pp. 2 and 3) further avers that on or about May 18, 1883, the relator filed in the office of the Clerk of the County of New York a map, diagram and tabular statement indicating the amount and position and localities of the spaces proposed to be occupied by the relator in and under the streets and other land in the City and County of New York, and further, that the relator immediately proceeded to make ready its material and plant for the construction of its electrical conductors and underground lines, in the City of New York, to develop and elaborate its mechanical constructions for the same, and make ready machinery and appliances and implements for its said works, in pursuance of the objects of its incorporation, at great expense to the relator; and, further, that the relator since the said 16th day of April, 1883, has purchased and partly paid for and become obligated to pay the sum of $50,000 and upwards for property essential to the due performance of said alleged contract; and, further, that more than 3,000 shares of the capital stock of the relator of the par value of $100 each have been issued by the relator since the execution of said alleged contract to persons who have purchased the same in reliance upon the said alleged contract and franchise.

These averments are assumed to be true, solely for the purposes of the present argument; but counsel for the defendant in error protest most strenuously against these averments being taken to be true in point of fact.

What has just been quoted from the averments of the petition states everything which the relator claims it has ever done on the faith of the alleged contract with the Board of Aldermen of the City of New York or otherwise.

In the year 1885 an act was passed by the Legislature of the State of New York (being chapter 499 of the Laws of 1885, passed June 15, 1885), entitled "An Act for placing electrical conductors underground in cities of this State and for Commissioners of Electrical Subways," in which act provision is made for the appointment of Commissioners of Electrical Subways and of which act, section 3 is in these words:

"When any company, operating or intending to operate elec-
"trical conductors in any such city [*i. e.*, a city of the State of New
"York, having according to the last census a population exceeding
"500,000], shall desire or be required to place its conductors or any
"of them underground in any of the streets, avenues or other high-
"way of any such city, and for that purpose to remove the same
"from the surface thereof, and shall have been duly authorized to do
"so, it shall be obligatory upon such company to file with said
"Board of Commissioners a map or maps, made to scale, showing
"the streets or avenues or other highways which are desired to be
"used for such purpose, and giving the general location, dimensions
"and course of the underground conduits desired to be constructed.
"*Before any such conduits shall be constructed, it shall be necessary to*
"*obtain the approval by said Board of said plan of construction so*
"*proposed by such company.* * * *."

(Record, pp. 10 and 11.)

On or about July 21, 1886, the relator made an application to the Commissioner of Public Works for a permit and written authority to open the streets and remove the paving-stones therefrom in the City and County of New York, for the purpose of laying the relator's wires and other conductors of electricity and of making connections of the same in accordance with the benefits and conditions of its said franchise. (Record, p. 4).

On or about August 23, 1886, the Commissioner of Public Works refused to give the relator such a permit, resting his refusal upon the sole ground that the relator had not acquired the approval of the Commissioners of Electrical Subways in the City and County of New York, of the plans and construction proposed by the relator (Record, p. 4).

Whereupon the relator applied to the Court of Common Pleas for the City and County of New York at Special Term, for a writ of peremptory mandamus to compel the Commissioner of Public Works

to issue the permit desired upon the ground *inter alia* that the Act of 1885 (*supra*) was unconstitutional with respect both to the Constitution of the State of New York and the Constitution of the United States (Record, pp. 1, and 4 and 5).

The Court at Special Term upheld the constitutionality of the act in both aspects, and denied the application. See its order entered October 22, 1886 (Record, p. 16).

The Court at General Term affirmed the order of the Special Term. See its order bearing date February 7, 1887, entered April 28, 1887 (Record, pp. 23 and 24).

On appeal therefrom to the Court of Appeals of the State of New York, that Court also expressly upheld the constitutionality of the act not only so far as the act was claimed to violate the Constitution of the State of New York, but also so far as the act was claimed to violate the Constitution of the United States. In the latter aspect of the case the Court of Appeals placed its decision in the last analysis upon the ground that the Legislature in passing the act in question merely exercised its right to regulate the use of the highways of the State under the police power for the public welfare.

(For the opinion herein of the Court of Appeals of the State of New York by RUGER, CH. J., see APPENDIX B to this Brief.)

The Court of Appeals, therefore, affirmed the order of the General Term of the Court of Common Pleas for the City and County of New York.

See its judgment rendered January 17, 1888. (Record, pp. 25 and 26.)

The judgment of the Court of Appeals of the State of New York having been made on January 20, 1888, the judgment of the Court of Common Pleas for the City and County of New York (Record, p. 26), the relator sued out a writ of error to the Supreme Court of the United States.

(Record, pp. 27 and 28.)

The following is a summary of the contentions of defendant in error:

First—No question in regard to the unconstitutionality of the Subway Act of 1885, as violative in any respect of the Constitution of the State of New York, may be argued in this Court. These questions have been passed upon by the highest Court in the State of New York, adversely to the relator.

Second—The Subway Act of 1885, section 7 (Record, p. 10 and onward), violates neither the provision of section 1 of the Fifth Amendment to the Constitution of the United States, in these words: "No person shall be deprived of property without due process of law," nor the provision of section 1 of the Fourteenth Amendment to the Constitution of the United States, in these words: "Nor shall any State deprive any person of property without due process of law."

Third—The Subway Act of 1885 does not violate the provision of section 10 of article 1 of the Constitution of the United States, in these words: "No State shall pass any law impairing the obligation of contracts."

Fourth—The judgment below should be affirmed.

POINTS.

FIRST POINT.

No question in regard to the unconstitutionality of the Subway Act of 1885 as violative in any respect of the Constitution of the State of New York may be argued in this Court. These questions have been passed upon by the highest Court in the State of New York adversely to the relator.

I.—There is no sound distinction between the construction of a law enacted by the legislature of a State and the construction of the organic law ordained by the people themselves. The exposition of both belongs to the judicial department of the government of the State and its decision is final and binding upon all other departments of that government and upon the people themselves until they see fit to change their Constitution; and the Supreme Court of the United States receives such a settled construction as part of the fundamental law of the State.

Webster v. *Cooper*, 14 How., 488.
B. R. Curtis's Jur. U. S. Cts. p. 204.
Crowley v. *Christensen*, 137 U. S., 86.
Jaehne v. *New York*, 128 U. S., 189, 194.
Minneapolis Railway Company v. *Beckwith*, 129 U. S., 26.
Palmer v. *McMahon*, 133 U. S., 660.

II.—In the Court below the Subway Act of 1885 was claimed by the relator to be unconstitutional, as a violation of the Constitution of the State of New York, on three separate and distinct grounds:

1st. That it violated art. 3, § 16: "No private or local bill, "which may be passed by the legislature shall embrace more than "one subject and that shall be expressed in the title."

2d. That it violated art. 3, § 17: "No act shall be passed which "shall provide that any existing law, or any part thereof, shall be

" made or deemed a part of said act, or which shall enact that any " existing law, or any part thereof, shall be applicable except by " inserting it in such act."

3d. That it violated art. 1, § 6: " No person shall be deprived " of property without due process of law."

Each of these three contentions was expressly and explicitly overruled not only by the Court at Special Term (Record, pp. 18–23), but also with equal explicitness by the highest Court of the State of New York.

See

Appendix B, containing the opinion by the Court of Appeals of the State of New York in *People of State of New York ex rel. N. Y. Electric Lines Co.* v. *Squire, Commissioner*, 107 N. Y., 593.

See also

American Rapid Telegraph Company v. *Hess*, 125 N. Y., 641.

SECOND POINT.

The Subway Act of 1885, § 7 [Record, p. 10 and onward], violates neither the provision of § 1 of the Fifth Amendment to the Constitution of the United States in these words: " No person shall be deprived " of property without due process of law," nor the provision of § 1 of the Fourteenth Amendment to the Constitution of the United States in these words: " Nor shall any State deprive any person of property " without due process of law."

I.—The Fifth Amendment of the Federal Constitution has no bearing on the present case, because the first ten articles of amendment of the Federal Constitution were intented to operate on the National Government alone.

Barron v. *The Mayor and City Council of Baltimore*, 7 Pet., 243, 247.

Spies v. *Illinois*, 123 U. S., 131, 166 and cases there cited.

In re Sawyer, 124 U. S., 200, 219.

Eilenbecker v. *Plymouth County*, 134 U. S., 31.

Presser v. *Illinois*, 116 U. S., 252.

II.—Unless the relator can successfully maintain that the Subway Act in question not only imposes a tax but deprives the relator of

property without due process of law in violation of the Fourteenth Amendment, the relator cannot prevail upon this branch of the argument at least; because the appropriate regulation of the use of property is not "taking" it within the meaning of the constitutional prohibition.

Railroad Co. v. *Richmond*, 96 U. S., 521.

1. Thus an ordinance of the City of Richmond, prohibiting the use of the engines of the Richmond, Fredericksburgh and Potomac R. R. Co., on Broad street, does not impair the vested rights of the company nor deprive it of its property without due process of law, nor deny the company the equal protection of the laws because the appropriate regulations of the use of property is not taking it within the meaning of the constitutional prohibition.

Railroad Co. v. *Richmond*, 96 U. S., 521.

2. So a State law making a railroad company liable to an employee for the negligence of a co-employee does not conflict with the Fourteenth Amendment to the United States Constitution.

Missouri Pacific Railway Co. v. *Mackey*, 127 U. S., 205.
Minneapolis and St. Louis Railway Co. v. *Herrick*, *id.*, 210.

3. So the right of a State to reasonably limit the amount of charges by a railroad company for the transportation of persons and property within its jurisdiction cannot be granted away by its legislature unless by words of positive grant or words equivalent in law.

Railroad Commission Cases, 116 U. S., 307, 335.

So also

Georgia Banking Co. v. *Smith*, 128 U. S., 174, 182.

III.—But the Subway Act in question does not levy a tax upon telegraph companies without equality or without consent, hearing or benefit, even though it compels the telegraph companies to pay the expenses of the Subway Commission and the expense of constructing the subway the said commission may build.

1. It has never been supposed that these laws imposed a tax within the meaning of the Federal Constitution.

This question has received a practical construction in the legislation of the State of New York by its laws imposing upon banking and insurance companies the expenses incurred by the government in the management and regulation of such institutions and their business operations.

This practical construction is adverse to any such construction.

Moreover, it is fortified by direct adjudication in this Court.

In *Nashville, Chattanooga & St. Louis Railway* v. *Alabama*, 128 U. S., 96, Mr. Justice FIELD, speaking for the Court, said at p. 101:

"Requiring railroad companies to pay the fees allowed for the "examination of parties who are to serve on the railroad in one of

" the capacities mentioned, is not depriving them of property with-
" out due process of law. It is merely imposing upon them the
" expenses necessary to ascertain whether their employees possess
" the physical qualifications required by law."

So in *Morgan Steamship Co.* v. *Louisiana Board of Health*, 118 U. S., 455, it was held that a State law, requiring each vessel passing a quarantine station to *pay a fee* for examination as to her sanitary condition and the ports from which she came, was a rightful exercise of police power.

So the State, under its police power, may require railroad employees to be examined by a competent board constituted by State authority as to their fitness for their service, *and impose upon the railroad companies the reasonable expense of such examination*, and such imposition will not deprive the companies of property without due process of law, the expense imposed on any company being restricted to the examination of persons who are about to be, or are at any time, actually employed by it, and as to whom examinations are compulsory.

Baldwin vs. *Louisville & Nashville R. Co.* (Sup. Ct. Alabama), 7 Lawyers' Rep., Annotated, 266; decided Dec. 10, 1889; *overruling* S. C., *sub nom.*

Louisville & Nashville R. R. Co. vs. *Baldwin*, 85 Alabama, 619; S. C., 5 Southern Rep., 311; decided February 6, 1889.

2. The constitutional reserved power to alter a corporate franchise (N. Y. Const., Art. 8, Section 1) prevents the supposed tax from really being a tax. It is no tax. At best it is merely a condition, for the continued exercise of a corporate franchise. *Qui sentit commodum, sentire debet et onus.*

See *Mayor, etc., of New York* v. *Twenty-third Street R. Co.*, 113 N. Y., 311, quoted fully *infra* under THIRD POINT, Division III., Subd. 3 (pp. 25–27 of this Brief), and other cases there cited directly in point.

3. Even if it be admitted that the law does impose a tax, it does not follow that notice to the relator was necessary, and even it were necessary, or any cause for invalidity existed, and the provision were void, that would not necessarily invalidate the other provisions of the statute.

(1.) Where life and liberty, or the title and possession of property are involved, due process of law requires that there be a regular course of judicial proceedings, and that the party to be affected shall have notice and an opportunity to be heard; but where the taking of property is in the enforcement of a *tax*, whether notice to him is necessary depends upon the character of the tax and the manner in which its amount is determinable.

In cases where a tax calls for no inquiry into the weight of evidence nor for anything in the nature of a judicial examination before collection, no notice to the owner is required.

Hagar v. *Reclamation District (No.* 108), 111 U. S., 701.

See also

Wurts v. *Hoagland*, 114 U. S., 606.

(2.) Proceedings to raise revenue by levying and collecting taxes are not necessarily judicial; and "the process of law," as applied to that subject, does not imply or require the right to such notice and hearing as are considered to be essential to the validity of the proceedings and judgments of judicial tribunals.

Kentucky Railroad Tax Cases, 115 U. S., 321.

See also

Palmer vs. *McMahon*, 133 U. S., 660.

(3.) The supposed "tax" is not unequal. The relator and others of the same class will derive a benefit from the performance of the public duty imposed upon them, and consequently there is no inequality in requiring, by a general and equal law, them who will derive such benefit to do the duty.

Goddard, Petitioner, 16 Peck., 504–509, *per* SHAW, *Ch. J.*

Village of Carthage v. *Frederick*, 122 N. Y., 268.

Cooley's Const. Lim., p. 726 (6th Ed.), "Law of the Road."

See also

Walston v. *Nevin*, 128 U. S., 578.

(4.) The Fourteenth Amendment was not intended to compel the States to adopt an iron rule of equal taxation.

Bell's Gap Railroad Company v. *Pennsylvania*, 134 U. S., 232.

Davidson v. *New Orleans*, 96 U. S., 97.

(5.) The Comptroller of the State is required to pay these expenses in the first instance and no question arises over the liability of the companies until they are called upon by the Comptroller, to refund to him the amount of such expenses.

(Subway Act of 1885, §§ 7 and 11, as amended: Record, p. 14, *et seq.*).

The present proceeding is not brought to enforce the payment of any such sum or indeed of any sum whatever. *This distinction is vital.*

Packet Co. v. *Keokuk*, 95 U. S., 80, at foot p. 89.

(6.) Moreover, the provision in this regard may, for the purpose of the argument, be assumed to be void without at all affecting the validity of the rest of the act. For the rule is well settled that if, when the unconstitutional portion of an act is stricken out, that which remains is complete in itself and is capable of being executed in accordance with the apparent legislative intent, wholly inde-

pendent of that which is rejected, the act must be sustained. It is only when different clauses of an act are so dependent upon each other that it is evident that the legislature would not have enacted one without the other that the whole act will fall with the invalidity of one clause. The sole point is whether they are essentially and inseparably connected in substance.

Huntington v. *Worthen*, 120 U. S., 97.
Presser v. *Illinois*, 116 U. S., 252.
Commonwealth v. *Hitchings*, 5 Gray, 482.
In the matter of Middletown, 82 N. Y., 196, 203.
People ex rel. City of Rochester v. *Briggs*, 50 N. Y., 553.
People ex rel. Angerstein v. *Kenney*, 96 N. Y., 294, 303; *Ibid.*, 491, 492.

It seems very clear that if this provision be rejected, the general purpose remains and is complete, and that there is nothing in the provision so connected in subject matter, meaning or purpose with the main scope of the act as to indicate that the Legislature would not have passed the latter without the former.

If the particular provision which the Legislature has attempted to make by the Act of 1885 as a *means of payment* is objectionable, it must be assumed that the Legislature will regard it as their duty to provide a substitute to carry out the original purpose of the Act of 1884.

Gordon v. *Cornes*, 47 N. Y., 608, at 616–618, closely in point.

III.—The Fourteenth Amendment of the Federal Constitution does not interfere in any respect with the *police power* of the State. It does not limit the subjects in relation to which the *police power* of the State may be exercised for the protection of its citizens.

Barbier v. *Connolly*, 113 U. S., 27, 31.
Mugler v. *Kansas*, 123 U. S., 623, 663.
Powell v. *Pennsylvania*, 127 U. S., 678, 683.
Walker v. *Pennsylvania*, 127 U. S., 699.
Minneapolis Railway Co. v. *Beckwith*, 129 U. S., 26.
Bell's Gap Railroad Company v. *Pennsylvania*, 134 U. S., 232, 238.
Bartemeyer v. *Iowa*, 18 Wall., 129, 138.
Butchers Union Co. v. *Crescent City Co.*, 111 U. S., 746.
Patterson v. *Kentucky*, 97 U. S., 501.

Consequently, the relator—plaintiff in error—must fail on this branch of the case unless it can show that the act in question was not passed in the legitimate exercise of the police power.

Counsel for the defendant in error submit with deference that the plaintiff in error is wholly unable to show this, and, in support of their own contention to the contrary, respectfully submit their own argument in a subsequent portion of this brief (see it in THIRD POINT, Division IV., pp. 29–39, *infra*).

THIRD POINT.

The Subway Act of 1885 does not violate the provision of Section 10 of Article 1 of the Constitution of the United States, in these words: "No State shall pass any law impairing the obligation of contracts."

I.—There is no *contract* whatever shown by the record, either expressly or by necessary implication. The relator was given but a mere *license*—which is not a contract—and its revocation does not deprive a party of property within the meaning of the Fourteenth Amendment.

1. Whether or not there is a *contract* within the protection of the Constitution of the United States, whose obligation may be impaired, must be determined by the Supreme Court of the United States, upon its own judgment and independently of the adjudication of the State Court.

Louisville Gas Co. v. *Citizens' Gas Co.*, 115 U. S., 683 at 697.
B. R. Curtis's Jurisdiction of U. S. Courts, p. 208.

2. A *license* is not a contract. It is not property in any legal or constitutional sense. It is merely a temporary permit to do what otherwise would be an offense against a general law and its revocation does not deprive a party of property, within the meaning of the Fourteenth Amendment.

Metropolitan Board of Excise v. *Barrie*, 34 N. Y., 657.
Calder v. *Kurby*, 5 Gray, 597.
Commonwealth v. *Brennan*, 103 Mass., 70, 71.
Commonwealth v. *Kingley*, 133 Mass., 578, 579.
State v. *Holmes*, 38 New Hampshire, 225.

3. The petition's naked averment of a contract (Record, p. 2) counts for nothing, if for no other reason than that the averment of a contract in express terms refers to the ordinances, resolutions, motions and communications from which the inference of a contract is drawn. The averment of a *contract*, therefore, is but the averment of a legal conclusion.

(1.) The averment in question may be found in the Record, p. 2, and is in these words:

"II.—On or about April 16, 1883, this plaintiff duly entered into "a *contract* with the Mayor, Aldermen and Commonalty of the City "of New York, whereby in consideration of plaintiff's promise to "comply with all the requirements, provisions, restrictions, con- "ditions and limitations contained in the ordinances of said municip-

" ality set forth in Exhibits A and B hereto annexed [motion by " Alderman Fitzpatrick of May, 1883, and Corporation Ordinance " of 1880], which ordinances were both a part of said contract, the " first of them having been passed for that express purpose and no " other, said municipality granted to plaintiff the franchise of " laying wires or other conductors of electricity in and through and " beneath the surface of the streets, avenues and highways of New " York City, and of making connections of such wires or conductors " underground by means of the necessary vaults, test boxes and " distributing conduits, and thence above ground with points of " electrical illumination or of telegraphic or telephonic signal, as " is set forth in Exhibit A hereto annexed. Said *contract* is evi- " denced by the ordinances, resolutions, motions and communica- " tions set forth in Exhibits A and B hereto annexed."

4. The absence of corporate power in the relator to take what it claims to have taken strengthens the contention by the defendant in error that what the relator received was but a mere license.

(1.) The corporate power of the relator is based upon the Act of 1879, as amended by the Act of 1881 (*supra*), of which the *proviso* is in these words :

" *Provided*, that such company shall, before laying any such line " in any city, village or town of this State, first obtain from the " Common Council of cities, the trustees of villages or the commis- " sioners of highways of towns, *permission* to use the streets within " said city, village or town for the purposes herein set forth."

On the question of what the relator has really taken from the Common Council, surely *this* indicates no intention on the part of the Legislature to delegate power to the Common Council to make a *contract*. The language of the proviso is that the *permission* of the Common Council shall be first obtained before the telegraph company shall lay its line underground. This is very cogent evidence of the intention of the Common Council to grant, and that the relator should receive, but a mere *license*.

(2.) The office of a *proviso* shows that the relator may receive only what is covered by the proviso. The office of a proviso, generally, is either to except something from the enacting clause or to qualify or restrain its generality or to exclude some possible ground of misinterpretation of it, as extending to cases not intended by the Legislature to be brought within its purview.

Minis v. *The United States*, 15 Pet., 423, 445.

(3.) The definition of the word "*permission*" shows that what the relator received was at most but a mere license.

(a.) *Bouvier's Law Dict.* (15th ed., 1883) defines "permission" as " follows :

"A license to do a thing; an authority to do an act, which "without such authority would have been unlawful."

"A permission differs from a law; it is a check upon the oper- "ations of the law."

(b.) So *Black's Law Dict.* (1891) defines "permission" in the same way:

"A license to do a thing; an authority to do an act, which with- "out such authority would have been unlawful."

(c.) In *Smith's Synonyms Discriminated* (London, 1882), the author at pp. 548, 549, defines "permission" as follows:

"Permission (Lat. *permissionem*) is the mere absence on the part "of another of prevention or of opposition, without implying "sanction or approval.

"'The will
"'And high *permission* of all-ruling Heaven
"'Left him at large to his own dark designs.'
"MILTON."

5. Adjudged cases show that what the relator received was but a mere license.

(1.) The acts under which the relator was incorporated did not operate as a grant to it of a franchise to use the streets.

There certainly was no formal grant, and the statutes contain no terms or phraseology appropriate to a grant.

They, at most, confer upon the plaintiff an authority or *license* to enter upon the streets for its purposes and subject to certain conditions. The people of the State do not own the streets, and the only authority the legislature has over them is to deal with them as streets, and to regulate their use as streets for public purposes; and by these acts, it, in effect, determined that one of the purposes for which the streets could be used was the erection of poles and stringing of wires for the business of telegraphy, and, under certain conditions, the placing them underground, and that that was a public use, not inconsistent with the use of the streets for general street purposes. These were general public legislative acts, in the exercise of the police power of the State; and, therefore, they were not beyond the reach or touch of future legislation. The legislature did not intend to divest itself, and could not divest itself, of its control over the streets for the public welfare, and we must infer from the language used that it did not intend to bind itself by an irrevocable grant.

If, therefore, these acts are to be construed as merely conferring a *license* which has been acted upon by the relator, the legislature could revoke the license, or modify it in any way, or at any time, when the public interests might require it.

See *American Rapid Telegraph Co.* v. *Hess*, 125 N. Y., 641, construing the Acts under review.

See also

People ex rel. Western Union Telegraph Co. v. *Dolan*, 126 N. Y., at 176.

(2.) In *Stone* v. *Mississippi*, 101 U. S., 814, the facts were that in 1867 the Mississippi Agricultural and Manufacturing Aid Society was granted by the Legislature the right to run a lottery in the State for 25 years.

In consideration of this grant the company paid into the State treasury $5,000, and an annual tax of $1,000.

In 1870 the State passed a law prohibiting all kinds of lotteries within its limits.

The company objected to being suppressed under this law, alleging that its charter constituted a contract on the part of the State to allow them to run a lottery for 25 years in consideration of the $5,000, and the $1,000 a year; and that this could not be abrogated by the State.

But the Court, in holding the statute valid, said:

1st. That the State had made no "contract"; it had only granted a "license."

2nd. That no Legislature could bargain away the police power of the State, and lotteries fell within that power.

On this case *Lawson* says in *Lead. Cas., Simplified, Eq. and Constitutional Law*, p. 233:

"The *first* point decided in *Stone* v. *Mississippi* is also very im-
"portant. The principle decided there is that a license from the
"State authorizing a person to do an act which, but for such
"license, would be forbidden, does not constitute a contract between
"the State and such individual which the State may not repeal or
"modify at its discretion. Licenses to sell spirituous liquor are
"a good illustration of privileges of this character. They are per-
"missions to sell liquor, to carry on a trade which is prohibited to
"persons not having licenses, and this privilege may be withdrawn
"by the State at any time."

6. The fact that upon the faith of the license or permission given by the Common Council, the relator may have expended money or otherwise acted on the license, does not invest the license with the qualities of a contract.

Cincinnati Inclined Plane Railway Company [plaintiff in error], at suit of *City & Suburban Telegraph Association* [defendant in error], 27 North Eastern Reporter, 890 (Supreme Court of Ohio, June 2, 1891), quoted at length *infra*, under THIRD POINT, *Division* III., Subdivision 3 (5), pp. 27–28 of this Brief.

In 2 *Hare's American Constitutional Law*, p. 665, the author says:

"It has been decided, conformably to the same principle [viz.: a
"strict construction as against the corporation and in favor of the
"public], that a statute or ordinance authorizing a natural or

"artificial person to use or occupy a street or highway is, in the "absence of a plainly expressed intention that the right shall be "permanent, *a mere license* and as such revocable, although the "grantee had made valuable improvements in the belief that the "privilege will not be recalled. (*The Southwark Railroad Co.* v. *The* "*City of Philadelphia*, 47 Penna. St., 314; *Branson* vs. *The City of Phila-* "*delphia*, 47 Pa. St., 329.) In the case last cited, the City Councils "of Philadelphia gave the complainant a written permission to con- "struct a turnout or siding from the City railway in Broad street to "his warehouse. The City subsequently proposed to remove the "railway, and the complainant asked for an injunction, on the ground "that he had gone to a great expense in the erection of fixtures for "the prosecution of his business, which would be useless unless the "railway was allowed to remain. The Court *held* that if a license to "connect a private with a public way might operate as a con- "tract that the public way should remain open, where the "question arose as between individuals, it did not admit of such "an interpretation when given by a municipal Corporation and the "streets of a city were concerned. A like view was taken in *The* "*Monongahela Navigation Co.* v. *Coons*, 6 Watts & S., 101, 112, "with regard to a dam which had been erected across a navigable "stream under a general authority conferred by statute.

"These decisions are obviously sound. An individual who "gives a license which cannot be enjoyed without the expenditure "of money may fairly be presumed to intend that it shall be "irrevocable (2 *Am. Lead. Cas.* (5th Am. Ed.), 546; *Rerick* v. *Kern*, "14 S. & R., 267); but no such inference can be drawn where the "State or a City is dealing with a highway and ought to retain the "power of supervision and control."

(2.) The settled rule of real property in the State of New York is even more unfavorable to the relator than that indicated as the Pennsylvania rule in the case of an individual, because in the State of New York the rule is that the mere fact that a valuable consideration is given for a license, or that valuable improvements have been made by the licensee on the strength and faith of the license, does not make the license irrevocable even as to an individual licensor.

Wiseman v. *Lucksinger*, 84 N. Y., 31.
Cronkhite v. *Cronkhite*, 94 N. Y., 323, 328.
Duryee v. *Mayor, &c., of N. Y.*, 96 N. Y., 477, 484.
Eckerson v. *Crippen*, 110 N. Y., 585, 592.

II.—Even assuming, for the purposes of the argument, that there is a *contract* in appearance, still there is none in point of law, because the Common Council had no power to make such a contract.

The supposed act of the Common Council in granting the alleged irrevocable franchise in question, was wholly *ultra vires*, nugatory, null and void.

The nature of the subject-matter to be operated upon, viz., a *public highway*, shows the want of power in the Common Council to grant what the relator claims the Common Council has granted.

1. "Repeated decisions of this Court (U. S. Supreme Court), "have established that whenever privileges are granted to a cor- "poration, and the grant comes under revision in the Courts, such "privileges are to be strictly construed against the corporation and "in favor of the public, and that nothing passes but what is granted "in clear and explicit terms."

This general rule of construction applies with still greater force to articles of association organizing a corporation under general laws.

Oregon Railway Co. v. *Oregonian R'y Co.*, 130 U. S., 1.
Turnpike Co. v. *Illinois*, 96 U. S., 63.
Stein v. *Bienville Water Supply Co.*, 141 U. S., 67; aff'g 34 Fed. Rep., 145.
Thomas v. *Railroad Co.*, 101 U. S., 71.
Penn. Co. v. *St. Louis, Alton, etc., Railroad*, 118 U. S., 290.
Lehigh Water Co. v. *Easton*, 121 U. S., 388–391.
Georgia Banking Co. v. *Smith*, 128 U. S., 174.
Belmont Bridge Co. v. *Wheeling Bridge*, 138 U. S., 287.
Charles River Bridge v. *Warren Bridge*, 11 Pet., 420.

The broad general principle that grants of franchises by the State are to be so strictly construed as to operate as a surrender of the sovereignty no further than is *expressly* declared by the terms of the grant, and that the grantee takes nothing in that respect by inference is equally applicable to the case of a grant of privileges by a municipal corporation.

Syracuse Water Co. v. *City of Syracuse*, 116 N. Y., 167, and cases cited *supra*.

2. The municipal corporation, as such, could bind itself by such contract only as it was authorized by statute to make. It could not grant *exclusive* privileges, especially to put pipes and conduits in its streets, nor could it lawfully, by contract, deny to itself the right to exercise the legislative powers vested in its Common Council. It cannot well be claimed that any express power was delegated to the municipality to grant any *exclusive* franchises, and *public policy will not permit the inference of authority to make a contract inconsistent with the continuously operative duty to make such by-laws, rules and regulations as the public interest or welfare of the City may require.*

It is not consistent with the discretionary powers which the Common Council may be required to exercise in the discharge of their duty to the public, which they represent, for them to grant, by contracts, *exclusive* privileges having the character of perpetuity.

In dealing with municipal corporations, parties are chargeable with knowledge of their powers, as they are furnished only by statute.

Syracuse Water Co. v. *City of Syracuse*, 116 N. Y., 167, 181, 182.

The Floyd Acceptances, 7 Wall., 666.

To the same effect, see

Alexander v. *Cauldwell*, 83 N. Y., 480.

Wilson v. *The Kings County Elevated Railroad Co.*, 114 N. Y., 487, 492.

Jemison v. *The Citizens' Savings Bank of Jefferson, Texas*, 122 N. Y., 135.

(1.) The Constitution of the State of New York (Art. 3, § 18), prohibits the Legislature from passing a private or local bill "granting to any private corporation, association or individual any "*exclusive* privilege, immunity or franchise whatever."

Syracuse Water Co. v. *City of Syracuse*, 116 N. Y., 167, 186, construing this constitutional provision.

A fortiori, the Common Council would have no power to grant such *exclusive* privilege. *S. C., Ibid.*

(2.) The sole ground for such a contention by the relator as has been indicated consists in the *proviso* of the Act of 1879, as amended by the Act of 1881 quoted (*supra*), in these words:

"*Provided*, that such company shall before laying any such line "in any city * * * of this State, first obtain from the Com- "mon Council of cities * * * *permission* to use the streets with- "in such city * * * for the purposes herein set forth."

On a question of power, surely *this* indicates no intention on the part of the Legislature to delegate power to the Common Council to make a *contract*. The language of the proviso is that the *permission* of the Common Council shall be first obtained before the telegraph company shall lay its line under ground. This is nothing but a power to grant a mere *license*.

(*a*) The office of a proviso and the definition of "permission" show this.

See THIRD POINT, Division I., subdivision 4, minor subdivisions (2) and (3) *supra*, at pp. 15 and 16 of this brief.

(3.) So far as the *power* of the Common Council is concerned, that is ascertained by examining the statute of the State of New York upon the subject—a statute of which this Court will take judicial notice (*Hanley* v. *Donoghue*, 116 U. S., at p. 6).

(*a*) This statute is the *New York City Consolidation Act* of 1882 (L. 1882, c. 410,) of which §§ 74, 85 and 86 are in these words:

"§ 74. Every *legislative* act of the Common Council shall be by resolution or ordinance * * *."

"§ 85. The Common Council shall have power to make, con-
"tinue, modify and repeal such ordinances, regulations and resolu-
"tions as may be necessary to carry into effect any and all of the
"powers vested in or conferred upon the corporation, and to pro-
"vide by ordinance whatever provisions or regulations, other than
"those herein specially authorized, may become requisite for the
"fuller organization, perfecting and carrying out the powers and
"duties prescribed to any department * * *."

"§ 86. The Common Council shall have power to make *ordi-*
"*nances* not inconsistent with law and the Constitution of this State,
"and with such penalties as are provided in the last section [viz.,
"§ 85 of the New York City Consolidation Act of 1882], in the mat-
"ters and for the purposes following, in addition to other powers
"elsewhere especially granted, namely:
* * *

"5. To regulate the opening of street surfaces, the laying of
"gas and water mains, the building and repairing of sewers and the
"erecting of gas-lights."

(*b*) As a legislator the powers of the Common Council are limited by the requirements of the City charter.

Duryee v. *Mayor, etc., of N. Y.*, 96 N. Y., 477, 492.

(4.) The alleged contract cannot be upheld on the ground—if taken—that the power to cause the City to be lighted (*ibid.*, § 86, subd. 9,) carries with it, by implication, all such powers as are clearly necessary for the proper and convenient exercise of the power expressly granted.

For, in the first place, that would have no application to two of the corporate objects of the relator, viz., telegraphic and telephonic communication. And, in the second place, so far as electric illumination is concerned, the power to *contract* for lighting the streets is lodged not in the Common Council, but in the Commissioner of Public Works, in conjunction with the Mayor and Comptroller. The subject is expressly provided for in § 69 of the *New York City Consolidated Act of* 1882, which is in these words:

"The Commissioner of Public Works in conjunction with the
"Mayor and Comptroller is authorized from time to time to con-
"tract for lighting the streets, avenues, piers, parks and places of
"the city with gas or other illuminating material by one or more
"contracts to be let at public lettings, as provided by law, for a
"period of one year, or any part of a year, and commencing and
"terminating at any dates the said board may determine. * * *"

(5.) It was the legislative intent in passing the New York City Consolidation Act of 1882 (L. 1882, c. 410), to revise and consolidate therein the whole statute law specially relating to said city.

Matter of New York Institution, 121 N. Y., 234.

3. If the Common Council should be supposed to make such a

contract as that claimed, it would abrogate in this respect its *governmental functions* and create a right subversive of the power of the legislature to regulate the exercise of the franchises conferred. This cannot be done.

Crenshaw v. *United States*, 134 U. S., 99 at 106.

Presbyterian Church v. *The Mayor, etc., of N. Y.*, 5 Cowen, 538.

Britton v. *The Mayor, etc., of N. Y.*, 21 Howard, New York Practice, Rep. 251 (1843), *per* SAMUEL NELSON, *Ch. J.*

Cincinnati Inclined Plane Railway Company, at suit of *City and Suburban Telegraph Association*, 27 North East. Rep., 890 (Supreme Ct., Ohio, June 2, 1891).

Montgomery v. *Capitol City Water Co.*, 9 South. Rep., 339 (Supreme Ct., Alabama, May 19, 1891.)

(1.) Thus in *Britton* v. *Mayor, etc., of New York* (*supra*)—an action by Britton to recover the compensation provided by a contract made in March or April, 1843, by the Common Council in relation to cleaning the streets of New York City—the City interposed a demurrer on the ground of non-liability under such contract. This demurrer was sustained by the Court, NELSON, *Ch. J.*, delivering the opinion only two years before he became a member of the Supreme Court of the United States.

The Court held that it was not competent for the Common Council to tie up and embarrass the execution of their public duties, whether legislative or executive, by contract or otherwise. In other words, it is not in its power to bind its legislative capacities by any private arrangements or stipulations, so as to disable itself from enacting any law that might be deemed essential for the public good. Therefore, they have no power to limit their legislative discretion by covenant (in reference to cleaning the streets, etc.), and they are not estopped from giving that answer.

(2.) So in *Cincinnati Inclined Plane Railway Company* [plaintiff in error] at suit of *City and Suburban Telegraph Association* [defendant in error], 27 North Eastern Reporter, 890 (Supreme Court of Ohio, June 2, 1891)—error to Superior Court of Cincinnati—where the suit was brought by the defendant in error to restrain the plaintiff in error from constructing and operating on the Carthage turnpike any sort of an electric railway which would interfere with plaintiff's lines.

In dismissing defendant in error's original petition, DICKMAN, J., speaking for the Court, said, at p. 897:

"The demand made by the telegraph association [the defendant in error] is not that the railway company shall so modify its existing electrical apparatus as not to interfere with the telephone service; but shall forever abandon the use of an essential part of

" its electro-motive system, or be perpetually enjoined. In other " words, the association claims the exclusive use of the grounded " circuit, inasmuch as the mechanism of the telephone is so com- " plex, and the electric currents employed so delicate and sensitive " that they cannot be used without disturbance from the heavier " currents employed by neighboring electrical enterprises that " operate with the grounded circuit.

" We find no foundation for such an exclusive franchise or right. " When the telegraph association began its operation under the " telephone system, neither the statutes authorizing it to erect and " maintain poles, wires and other necessary fixtures, nor the " ordinance authorizing it to erect and maintain poles, wires and " other necessary fixtures, nor the ordinance under which it ob- " tained the power to extend its lines in the streets, gave an " exclusive right either to use the earth for a return circuit, or a " complete metallic circuit formed by double wires. The legislature " did not grant the right by general enactment, *nor was the munici- " cipal corporation empowered by the legislature to give the telegraph " association the exclusive right to make use of its streets so as to create " a monopoly.*

" In *State* v. *Coke Co.*, 18 Ohio St., 262, it was *held* that a munici- " pal corporation cannot, without clear legislative authority, grant " an exclusive right to the use of the streets for certain purposes to " an individual or corporation. To enable it to grant such an ex- " clusive right by ordinance in the nature of a contract, the power " must be shown to have been expressly granted, or to be so far " necessary to the proper execution of the powers which are ex- " pressly granted as to make its existence free from doubt."

Consequently, the Court *held* as the foundation of its judgment, that the dominant purpose for which streets in a municipality are dedicated and opened is to facilitate public travel and transportation, and, in that view, new and improved modes of conveyance by street railways are by law authorized to be constructed, and a franchise granted to a telephone company of constructing and operating its lines along and upon such streets is subordinate to the rights of the public in the streets for the purpose of travel and transportation.

Also, that the fact that a telephone company acquired and entered upon the exercise of a franchise to erect and maintain its telephone poles and wires upon the streets of a city prior to the operation of an electric railway thereon, will not give the telephone company, in the use of the streets, a right paramount to the easement of the public to adopt and use the best and most approved mode of travel thereon; and, if the operation of the street railway by electricity as the motive power tends to disturb the working of the telephone system, the remedy of the telephone company will be to readjust its methods to meet the condition created by the introduction of electro-motive power upon the street railway.

And, further, that where a telephone company, under authority derived from the statute, places its poles and wires in the streets of a municipality, and, in order to make a complete electric circuit for the transmission of telephonic messages, uses the earth, or what is known as the "ground circuit," for a return current of electricity, and where an electric street railway, afterwards constructed upon the same streets, is operated with the "single trolley overhead system," so called, of which the ground circuit is a constituent part, if the use of the ground circuit in the operation of one of the street railways interferes with telephone communication, the telephone company, as against the street railway, will not have a vested interest and exclusive right in and to the use of the ground circuit as a part of the telephone system.

See also

Hudson River Telephone Co. v. *Watervliet Turnpike & Railroad Co.*, 121 N. Y., 397 at 405.

(3.) Authority "to cause the streets of a city to be lighted," and to make "reasonable regulations" with reference thereto, does not impower the city government to grant to the company the exclusive right to furnish gas for 30 years. The exclusive right to light a city with gas for 30 years is not legally "impaired" by a subsequent contract with another company to light the streets with electricity.

Saginaw Gas-Light Co. v. *City of Saginaw*, 28 Fed. Rep., 529 (U. S. Circuit Ct., E. D., Michigan, Sept. 7, 1886, *per* BROWN, *J.*). Citing

New Orleans Gas Co. v. *Louisiana Light Co.*, 115 U. S., 650, and

Louisville Gas Co. v. *Citizens' Gas Co.*, 115 U. S., 683.

To same effect see

Omaha Horse Ry. Co. v. *Cable Tramway Co.*, 30 Fed. Rep., 324 (U. S. Circuit Ct., Dist. Nebraska, March 5, 1887, *per* BREWER, *J.*)

S. C., 32 Fed. Rep., 727.

(4.) So where a city charter gave the council power to make, amend and repeal any ordinances deemed desirable for lighting the streets, and taking charge of them, but did not confer, in express terms, exclusive power over them.

Held, that it did not by implication give the city control of the streets to the exclusion of the sovereign power of the State, and that an ordinance granting *exclusive* use of the streets for wires and poles for electric lights for 15 years was *ultra vires* and void.

Grand Rapids Electric Light and Power Co. v. *Grand Rapids Edison Electric Light and Fuel Gas Co.*, 33 Fed. Rep., 659 (U. S. Circuit Ct., Mich., January 9, 1888).

III.—Assuming, further, for the purposes of the argument that the Common Council had power to make such a con-

tract as claimed by the relator, the Constitutional reservation of power over corporations placed the relator within the power and at the mercy of the legislature so far as concerns the *continuance of* the relator's assumed rights intact.

1. In no aspect of the case can the supposed rights of the relator be considered in the nature of corporate property pure and simple. Should they be so considered, it would enable relator to *own* a portion of the public street, a right which the settled rule of real property in the highest Court of the State of New York declares cannot be so acquired. *Governmental* duties, for the benefit of the public cannot be relinquished in that manner.

St. Vincent Orphan Asylum vs. *City of Troy*, 76 N. Y., 108 at 114.
Driggs v. *Phillips*, 103 N. Y., 77.
Bliss v. *Johnson*, 94 N. Y., 235, 241.
Bridges v. *Wyckoff*, 67 N. Y., 130.
Elliott on Roads and Streets, pp. 667, 668, 669.

2. Section 1 of article 8 of the Constitution of the State of New York, of 1846, provides that "Corporations may be formed under "*general* laws, but shall not be created by special act, except for "municipal purposes, and in cases where, in the judgment of the "legislature, the objects of the corporation cannot be obtained "under general laws. All general laws and special acts passed "pursuant to this section may be altered from time to time, or "repealed."

This constitutional provision incorporated 1 N. Y. R. S. of 1828, page 600 (side paging), § 8, in these words:

"The charter of every corporation that shall hereafter be granted "by the legislature shall be subject to alteration, suspension and "repeal, in the discretion of the legislature."

3. As the Legislature of the State of New York thus has the power utterly to deprive the corporation of its franchise to be a corporation, it may prescribe the conditions and terms upon which it may live and exercise such franchise. It may enlarge or limit its powers, and it may increase or limit its burdens.

Mayor, &c., of New York v. *Twenty-third Street Railroad Co.*, 113 N. Y., 311, 317, 318, and cases there cited.
Tomlinson v. *Jessup*, 15 Wall., 454, 459.
Miller v. *State*, 15 *ibid*, 478.
Holyoke Company v. *Lyman*, 15 Wall., 500.
Shields v. *Ohio*, 95 U. S., 319.
Greenwood v. *Freight Company*, 105 U. S., 13.
Spring Valley Water Works v. *Schottler*, 110 U. S., 347.
Pomeroy's Constitutional Law (10th ed.), §§ 586 m., 599.
Parker v. *Metropolitan Railroad Co.*, 109 Mass., 506, 508.

Pennsylvania Railroad Co. v. *Miller*, 132 U. S., 75.
Sioux City Street Railway Co. v. *Sioux City*, 138 U. S., 98.
Chicago Life Ins. Co. v. *Needles*, 113 U. S., 574, 580.

(1.) Thus, in *Tomlinson* v. *Jessup*, 15 Wall, 454 (*supra*)—where the charter of the corporation was subjected to a general act similar to that quoted, *supra*—it was held by this Court that "the object of "the reservation, and of similar reservations in other charters, is "to prevent a grant of corporate rights and privileges in a form "which will preclude legislative interference with their exercise, if "the public interest should at any time require such interference. "It is a provision intended to preserve to the State control over "its contract with the corporators, which without that provision "would be irrepealable and protected from any measures affecting "its obligation."

(2.) So, in *Miller* v. *The State* (*ibid*, 478), the very provision inserted in the Constitution of the State of New York in 1846 (quoted, *supra*) was considered by this Court, and it was held that "where such a provision is incorporated in the charter it is clear "that it qualifies the grant, and that the subsequent exercise of "that reserved power cannot be regarded as an act within the "prohibition of the constitution."

(3.) So in *Mayor, &c., of N. Y.* v. *Twenty-third St. R. Co.*, 113 N. Y., 311 (*supra*) the Court—in construing the constitutional provisions of the State of New York (quoted *supra*)—speaking through EARL, J., said at pp. 317, 318:

"It is difficult to put precise limits upon the power of the Legis- "lature, thus reserved over corporations created by it or under "its authority. Under its reserved power it cannot deprive a "corporation of its property, or interfere with, or annul its "contracts with third persons. (*People* v. *O'Brien*, 111 N. Y., 1). "But it may take away its franchise to be a corporation, and may "regulate the exercise of its corporate powers. *As it has the "power utterly to deprive the corporation of its franchise to be a "corporation, it may prescribe the conditions and terms upon which "it may live and exercise such franchise. It may enlarge or limit "its powers, and it may increase or limit its burdens.* It is some- "times said that the alteration under such reserved power must, "however, be reasonable, and it must always be legislative in its "character, and consistent with the scope and objects of the cor- "poration as it was originally constituted. Here, in the first "instance, by the Act, chapter 199 of the Laws of 1873, a license "fee of $50 for each car was considered a sufficient compensation "to the city for the valuable franchise enjoyed by the corporation. "But, on further consideration, the Legislature concluded that "it would be more convenient and beneficial to the city, and a

"fairer measure of the compensation which it should receive, "that a percentage on the gross receipts should be paid. And "this change the Legislature was competent to make within every "authority that can be found in the books." [Citing a large number of cases, among others, many of those in the U. S. Supreme Court, cited *supra*, as well as other cases in the same Court.]

To the same effect see

American Rapid Telegraph Co. v. *Hess*, 125 N. Y., 641, 645, 646.

(4.) So in *Sioux City Street Railway Co.* vs. *Sioux City*, 138 U. S., 98—error to the Supreme Court of the State of Iowa—it appeared that on December 12, 1883, the City of Sioux City, Iowa, by ordinance conferred on a street railway company, incorporated December 6, 1883, under the general laws of Iowa, the right of operating a street railway, with the requirement that it should pave the streets between the rails.

Subsequently, under the act of March 15, 1884, the city, by ordinance, required the company also to pave the street for one foot outside of the rails, and assessed a special tax against it for the cost of the paving outside of the rails.

Under § 1090 of the Code of Iowa, which was in force when the company was incorporated, its franchise was subject to such conditions as the legislature should thereafter impose as necessary for the public good.

Held, that there was no contract between the company and the State or the city, the obligation of which was impaired by the laying of the tax.

(5.) So in the very late case of *Cincinnati Inclined Plane Railway Company* [plaintiff in error] vs. *City and Suburban Telegraph Association* [defendant in error] (*supra*) [not yet reported in the regular State series] DICKMAN, *J.*, in delivering the opinion of the Supreme Court of Ohio (27 N. E. Rep., 890), said at p. 897:

"It is contended, however, that the defendant in error, by virtue "of its grants, acquired, before the railway company had a right to "use electricity as a motive power, a vested interest in the tele- "phone system as it now operates it, with a grounded circuit, and "that not even the Legislature of the State could take away from "it or injure this franchise, *on the faith of which it has expended its "capital and labor*. Special privileges or immunities are under the "control of the Legislature. If granted, they may be altered, re- "voked or repealed, by the General Assembly. Art. I., § 2, of the "Constitution. And, while corporations with valuable franchises "may be formed under general laws, all such laws may from time to "time be altered or repealed. Const., Art. 13, § 2. In view of these "constitutional provisions, it is clearly within the power of the "General Assembly to authorize one class of corporations to use

"in the streets electricity with the grounded circuit, as a motive "power, and another class to employ the same or a similar agency "for the transmission of telegraphic or telephone messages. And, "if the proper exercise of the rights granted to the one class, under "general law, is irreconcilable, and plainly interferes with a prior "grant to a corporation of the other class, it may be construed as "the intention of the Legislature to deny an exclusive franchise, if "not to repeal the antecedent grant.

"In view of the special benefit conferred by the grant of corpo- "rate power, it is evident that the primary object or design of the "State in granting the franchises of telegraph and telephone com- "panies is, in a large measure, to subserve the public benefit and "convenience, and not the mere pecuniary advantage of the owners "of the corporate property. *The exercise of their corporate privileges "is subordinate to the accommodation of those who travel on the streets "or highways.* * * *

"Having received their corporate franchises from the State, they "hold them in implied trust for the benefit of the community at "large, and subject to the constitutional grant of legislative power "to control the exercise of those franchises, in the future, as the "public good may require. A franchise, if granted by the State "with a reservation of a right of repeal, must be regarded as a mere "privilege while it is suffered to continue, and the legislation may "take it away at any time and the grantees must rely for the per- "petuity and integrity of the franchise granted to them solely upon "the faith of the sovereign grantor (*Pratt* v. *Brown*, 3 Wisc., 603; "*Cooley Const. Lim.* (6th ed.), 472).

"But, in the absence of such a reservation, its force and effect "may be attained through the constitutional power vested in the "General Assembly to alter or repeal, from time to time, all general "laws under which corporations are formed, and to alter, revoke, "or repeal all special privileges or immunities that may have been "granted."

(6.) Indeed, the reservation is equally valid and effectual whether it exists in the Constitution of the State or in a prior general law.

Miller v. *The State*, 15 Wall., 478 (*supra*).

4. The authorities sustaining this power of the Legislature are not in conflict with two somewhat recent cases decided by this Court, to wit, *New Orleans Gas Co.* v. *Louisania Light Co.*, 115 U. S., 650, and *Louisville Gas Co.* v. *Citizens' Gas Co.*, *ibid*, 683, which will undoubtedly be relied upon by the relator to sustain this appeal. Because:

(1.) In the first of those cases it is distinctly stated in the opinion that the authority of the State of Louisania in the premises had not been at the time limited by her own organic law.

(2.) While in the other case a statute had been enacted in the year 1856 by the Legislature of the State of Kentucky, declaring

that all charters and grants of or to corporations, or amendments thereof, and all other statutes shall be subject to amendment or repeal at the will of the Legislature unless a contrary intent be therein plainly expressed. This statute was held to be inapplicable to the case of the charter then under consideration by the Court, for the reason that a contrary intent than that mentioned in this provision, had been plainly expressed by the Legislature in the charter of the corporation, and for that reason it was held by the Court that it was not subject to amendment, repeal or alteration at the will of the Legislature, under the authority of the said general Act of 1856.

5. The fact that the alleged franchise in question comes not by special charter from the Legislature, nor by general compliance with a general act of incorporation, but by an alleged special grant from the Common Council of the City of New York weakens rather than strengthens the relator's case; because, as a legislator, the powers of the Common Council are delegated powers, and are limited by the requirements of the City Charter.

Duryee v. *Mayor, &c., of N. Y.*, 96 N. Y., 477, 492.

6. In the present case it is very apparent that the mode of enjoyment only is affected by the act whose constitutionality is under review, and the relator remains possessed of the substantial right which was conferred upon it when it received its license or permission, even coupling with such license or permission relator's alleged subsequent action on the faith thereof.

7. To support the contention of the defendant in error in this regard, it would appear not indispensable to rely upon the foregoing principle of constitutional reservation of power, because (without any constitutional reservation) it is an "*implied* condition "that a corporation shall be subject to such reasonable regulations, "in respect to the general conduct of its affairs, as the Legislature "may, from time to time, prescribe, which do not materially interfere with or obstruct the substantial enjoyment of the privileges "the State has granted, and serve only to secure the ends for which "the corporation was created." And consequently an act having such end in view will not, when applied to corporations theretofore existing, impair the obligation of contracts.

Chicago Life Ins. Co. v. *Needles*, 113 U. S., 574, 580.

That such is the nature of the act under review would seem to admit of no reasonable doubt.

IV.—But assuming, for the sake of the argument, that there was a contract not only in appearance but valid in point of law, and whose continuance would not under ordinary circumstances, be under the power of the legislature, the State law complained of did not violate the obligation of that contract because it was clearly passed in the legitimate exercise of the *police power* of the State.

Consequently, the relator-plaintiff in error must fail unless it can show that the act in question was not passed in the legitimate exercise of the *police power* of the State.

1. The constitutional prohibition upon State laws impairing the obligation of contracts does not restrict the power of the State to exercise its *police power* so as to protect the public *health*, the public *morals*, or the public *safety*, as the one or the other may be involved in the execution of such contracts.

Rights and privileges arising from a contract with a State are subject to regulations for the protection of the public health, the public morals and the public safety, in the same sense and to the same extent as are all contracts and all property, whether owned by natural persons or corporations.

New Orleans Gas Co. v. *Louisiana Light Co.*, 115 U. S., 650.
Stone v. *Mississippi*, 101 U. S., 816.
Butchers' Union Co. v. *Crescent City Co.*, 111 U. S., 746.
Stein v. *Bienville Water Supply Co.*, 34 Fed. Rep., 145, affirmed 141 U. S., 67.
Beer Company v. *Massachusetts*, 97 U. S., 25.
Salem v. *Maynes*, 123 Mass., 372, *per* GRAY, CH. J.
Black on Constitutional Prohibitions, § 24.
Ordronaux on Constitutional Legislation, p. 285.

2. Whatever differences of opinion may exist as to the extent and boundaries of the police power and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the public morals, the public health and the public safety.

Thus lotteries[1] and the manufacture or sale of intoxicating liquors in buildings erected for the purpose even *before* the passage of the statute[2] as affecting the public morals; nuisances[3], the sale of oleomargarine lawfully manufactured even *before* the passage of the statute[4], the regulation of markets[5], the establishment of quarantine laws[6], the regulation of the sale of milk[7], the manufacture and sale of wine[8], the regulation of public laundries[9], the prohibition of the employment of all persons under the age of eighteen, and of all women, in laboring in any manufacturing establishment more than sixty hours per week[10], the requirement that plumbers get a certificate of competency from the State Board of Commissioners of Practical Plumbing before they can engage in business[11], as affecting the public health; and fire regulations restricting or prohibiting the erection of wooden buildings within the municipality[12], the inspection and gauging of oils and fluids[13], the prohibition of overhead electric wires[14], the regulation, restriction and prohibition of the running at large of dogs in cities and authorizing their summary destruction when kept contrary to law[15], the requirement that a railway maintain fences and cattle

guards on its right of way and in default thereof be liable for double damages[16], that a railway establish stations at specified places on the line of its road and that its locomotives shall whistle, or ring a bell before crossing any public highway[17], the requirement that a railway drive its engines on a railway within a State only by one who has been licensed by a State Board of Examiners[18], that a State may authorize a municipality to forbid the use of steam power by railways within its limits[19], and the requirement that parties before they may practice medicine or sell drugs shall obtain a license[20], the prohibition of gunpowder in unsafe quantities in cities and villages, the sale of poisonous drugs unless labeled or the keeping for sale unwholesome provisions or other deleterious substances[21], as affecting the public safety—all fall within the recognized police power.

[1] *Stone* v. *Mississippi*, 101 U. S., 814.

[2] *Mugler* v. *Kansas*, 123 U. S., 623.
Kidd v. *Pearson*, 128 U. S., 1.
Walling v. *Michigan*, 116 U. S., 446.
Beer Co. v. *Massachusetts*, 97 U. S., 25.
Crowley v. *Christensen*, 137 U. S., 86.

[3] *Fertilizing Co.* v. *Hyde Park*, 97 U. S., 659.
Watertown v. *Mayo*, 109 Mass., 315 [Noxious trade].
Kincaid's Appeal, 66 Penna. St., 411 [burial].
Windt v. *German Reformed Church*, 4 Sand. Ch. 471.
Coates v. *Mayor, etc., of N. Y.*, 7 Cow., 585 [burial].

[4] *Powell* v. *Pennsylvania*, 127 U. S., 678.
Walker v. *Pennsylvania*, *id.*, 699.

[5] *Natal* v. *Louisiana*, 139 U. S., 621.
1 *Dillon on Munic. Corp.*, § 141 (4th ed.).
9 *Lawyers' Reports Annotated* : *Note* at page 69.

[6] *Morgan* v. *Louisiana*, 118 U. S., 455.

[7] *People* v. *Cipperly*, 101 N. Y., 634.

[8] *Ex parte Kohler*, 74 Cal., 38.

[9] *Barbier* v. *Connolly*, 113 U. S., 27.

[10] *Commonwealth* v. *Hamilton Manufacturing Co.*, 120 Mass., 383, 384.

[11] *Singer* v. *State*, 19 Atlantic Reporter, 1044 (Court of Appeals of Maryland, June 19, 1890).
See also as to the public health
Leading Article on "*The Police Power and the Public Health*," by H. Campbell Black, in 25 American Law Review (No. 2 for March–April, 1891), pp. 170–184.

[12] *City of Salem* v. *Maynes*, 123 Mass., 372, *per* GRAY, CH. J.

[13] *Patterson* v. *Kentucky*, 97 U. S., 501.

[14] *Electric Imp. Co.* v. *City and County of San Francisco*, 45 Fed. Rep., 593.
Same v. *Scannell*, *id.*, 596.

15 *Blair* v. *Forehand*, 100 Mass., 136, *per* GRAY, J.
Julienne v. *Mayor, etc., of the City of Jackson*, 10 Southern Rep., 43.
Myer on Vested Rights, p. 327.
16 *Minneapolis Railway Co.* v. *Beckwith*, 129 U. S., 26.
Missouri Pacific Railway Co. v. *Humes*, 115 U. S., 512.
Myer on Vested Rights, p. 324.
Black on Constitutional Prohibitions, § 70.
17 *Black on Constitutional Prohibitions*, §§ 70 and 27 and cases there cited.
18 *Smith* v. *Alabama*, 124 U. S., 465.
19 *Railroad Co.* v. *Richmond*, 96 U. S., 521.
20 *Dent* v. *Virginia*, 129 U. S., 114.
State v. *Heinemann*, 49 North Western Rep., 818 (Supreme Court, Wisconsin, Sept. 29, 1891).
21 *Cooley's Const. Lim.* (6th ed.), p. 740 and cases there cited.

3. Within the rule of "judicial inclusion and exclusion" the present case is clearly within the police power of the State.

(1.) Assuming that the acts referred to constitute in some sense grants of interests in the streets to the companies organized under them, and contracts *sub modo* with such corporations, the contention of the relator must fail.

In the exercise of its rights under the assumed grant and contract, the relator was subject to the regulation and control of the Legislature. By giving the franchise, the State did not abdicate its power over the public streets, nor in any way curtail its *police power* to be exercised for the general welfare of the people; nor did the State absolve itself from its primary duty to maintain the streets and highways of the State in a safe and proper condition for public travel, and other necessary street and highway purposes.

The grant, if any, was made in reference to the streets and their maintenance and regulation forever as streets. The State could at all times regulate the size and location of telegraph poles, if erected, the height of the wires from the surface of the ground, and their location in the streets; and when the poles and wires became a serious obstruction and nuisance in the streets, from any cause, it could take such action and make such provisions by law as were needful to remove the nuisance and restore the utility of the streets for public purposes.

The right of the relator to maintain and operate its wires in the streets could certainly be no greater than the right of railroads, which by public authority occupy the streets and highways of the State.

The State, in the exercise of its police power, and the regulating control which it has over corporations created by its authority, may exercise a general supervision over such corporations. It may pre-

scribe the location of the tracks, the size and character of the rails, the precautions which shall be taken for the protection of the public, and the character and style of highways' crossings; and no one has ever questioned that it may do whatever is necessary and proper for the public welfare in the control and regulation of the franchises which such corporations have obtained by statutory authority.

See *American Rapid Telegraph Co.* v. *Hess*, 125 N. Y., 641.

(2.) The alleged contract itself provides that the work of removal and replacement and of making excavations in the streets, avenues, etc., of the city by any telegraph company for the purpose of laying its wires, shall be subject to the control and supervision of the Commissioners of Public Works, and such commissioners might well require, in the exercise of their discretion, that the locality, time, mode and manner of performing such work should be approved by the officers having the general supervision of that subject in the city before authorizing a single company, among the many claiming such privileges, to tear up its streets and construct trenches through its various thoroughfares and avenues at their own will and pleasure.

(3.) This legislation did not, and was not intended to, materially impair or restrict the enjoyment of the license secured to the relator. The necessity of these acts sprung out of a great evil, which in recent times has grown up and afflicted large cities by the multiplication of rival and competing companies, organized for the purpose of distributing light, heat, water, the transportation of freight and passengers, and facilitating communication between distant points, and which require in their enterprises the occupation not only of the surface and air above the streets, but indefinite space underground.

This evil had become so great that every large city was covered with a network of cables and wires attached to poles, houses, buildings and elevated structures, bringing danger, inconvenience and annoyance to the public. Extensive spaces underground were also required to lay pipes and build trenches and arches, to transact the business of the various corporations requiring them.

These works not only called for great skill to harmonize the various and conflicting claims of competing companies to rights above as well as beneath the ground, but a comprehensive plan and supervision to prevent the constant disruption of the streets and the interruption of travel. The necessity of a remedy for these public annoyances had long been felt, and it finally culminated in the enactment of the Subway Acts.

These statutes were obviously intended to restrain and control, as far as practicable, the evils alluded to, by requiring all such wires to be placed underground in such cities, and be subject to

the control and supervision of local officers, who could reconcile and harmonize the claims of conflicting companies, and obviate, in some degree, the evils which had grown to be almost, if not quite, intolerable to the public. The scheme of these statutes was not to annul or destroy the rights of such companies, but to regulate and control their exercise. They did not purport to deny them any privileges theretofore granted, but they did require that they should be exercised with due regard to the claims of others, and in such a way that they should cease to constitute *a public nuisance*, and should be enjoyed in such a manner as to inconvenience and endanger the general public as little as possible.

That regulations of the character provided for in these acts are strictly police regulations, and such as no chartered rights can nullify or override, is too clear to admit of dispute.

"It is of higher importance that the ordinary use of the high-
" ways should not be interrupted than that these [electric light]
" companies should enjoy the privileges they desire, and it is so
" deemed by the Legislature."

Suburban Light and Power Co. v. *Board of Aldermen of City of Boston*, 26 N. E. Rep., 447 (Supreme Judicial Court of Mass., January 26, 1891).

(4.) The primary and fundamental object of all *public highways* is to furnish a passageway for travelers in vehicles, or on foot, through the country.

1 *Bouvier's Institutes*, § 442.

They were originally designed for the use of travelers alone. But in the course of time and in the interest of the general prosperity and comfort of the public they have been put, especially in large cities, to numerous other uses; but such uses have always been held to be subordinate to the original design and use.

Thus they have been appropriated in recent times for the reception of sewers, water-pipes, gas-pipes, pipes for heating and manufacturing purposes, underground railroads, trenches for wires for telegraph, telephone and other purposes, which all require in their construction the disruption of the pavements and the temporary interruption, at least, of the rights of travelers in the public highways.

The due and orderly arrangement of the various and conflicting claims to privileges in the streets of large cities would seem imperatively to require the creation of a neutral board, with controlling authority, to form a comprehensive plan by which these various enterprises may be harmonized and carried on without detriment to each other, and with due regard to the rights of the public. Such power is pre-eminently a *police power*.

(5.) In *Western Union Tel. Co.* v. *Mayor, etc., of the City of New York*, 38 Fed. Rep., 552 (U. S. Circuit Court, S. D., New York, April

15, 1889)—a suit in equity to restrain defendant, the Mayor, etc., from interfering with the poles and wires of complainant Telegraph Company—WALLACE, *J.*, said, at p. 555:

"*The statutes which the defendants are proceeding to enforce* [viz., Laws of N. Y., 1884, chap. 534; *id.*, 1885, chap. 499 (the very act under consideration), *id.*, 1887, chap. 716] *unquestionably belong in the category of police regulations, the power to establish which has been left to the individual States.*

* * *

"Applying these principles, it is now to be considered whether "the statutes in question or the acts of the defendants under them "can be defended under the State power of police regulation, or "whether what is proposed to be done exceeds in any respect the "boundaries of legitimate regulations, and encroaches upon the "rights of the complainant founded upon the law of Congress, or "incidental to the nature of its commerce."

At p. 558, WALLACE, *J.*, proceeds as follows:

"The question, then, is whether or not these statutes unreasonably abridge or burden privileges and immunities which the complainant derives from the general government. In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect; and these statutes are to be judged by the extent of the powers which they confer, and treated as police regulations only to the extent to which their operations can be justified by the police power of the State. Undoubtedly in carrying them into effect, the complainant will be subjected to great expense, the temporary interruption of its business and possibly to permanent inconvenience and loss in conducting its business. But, after all, the question is merely one of the reasonableness of the regulation, and whether the losses and inconvenience to which the complainant may be subjected are not such as may justly be exacted of every citizen or property owner for the common good.

* * *

"The subordination of the property rights of the owner to the just exercise of the police power of the State is as complete as it is to the taxing power of the State, which requires him to contribute his proportion of the burden of taxation. Indeed, the two powers of regulation are co-ordinate and co-extensive, and the limitations upon one may well be ascertained by the limitations upon the other.

"As is said by the Court in *Kidd* v. *Pearson*, 128 U. S., 1:

"' The police power of a State is as broad and plenary as its taxing power; and ' property within the State is subject to the operations of the former so long as it is ' within the regulating restrictions of the latter.'

* * *

"The legislation in question does not contemplate any regulation which is not practically feasible; but what is prescribed, if judiciously enforced, can be complied with by the companies operat-

" ing electric wires without serious detriment to their instrumentali-
" ties. The expense, and the temporary or occasional interruptions
" and inconveniences which are incident to the scheme proposed,
" constitute the extent of their sacrifice for the general comfort and
" convenience. Such legislation does not infringe upon the power
" of Congress to regulate commerce, or upon the exemption of the
" agencies of the General Government from State control.

" The reports of the decisions of the Supreme Court abound
" with cases illustrating the rule that all local arrangements and
" regulations respecting *highways*, railroads, bridges, canals, ferries
" and wharves within the State, their location, *supervision and de-*
" *tails of management*, though materially affecting commerce both
" internal and external, and thereby incidentally operating measur-
" ably upon the transaction of interstate commerce are within the
" power and jurisdiction of the several States. When the regula-
" tions do not act upon the commerce through the local instruments
" to be employed after coming within the State, but directly upon
" business as it comes into the State from without, or goes out from
" within, they are nugatory; otherwise they are valid. The most
" frequent illustrations are found in the exercise of the taxing
" power of the State; and the distinction has always been observed,
" though in many cases the line has seemed obscure, between tax-
" ation or regulation of commerce itself and of subjects which are
" merely auxiliary. So with respect to State legislation which
" touches the instrumentalities of Federal agencies. Those agencies
" are exempt from State control by police regulation, or by the ex-
" ercise of the taxing power, so far only as that legislation may
" interfere with or impair their efficiency in performing the func-
" tions by which they are designed to serve the Government.

" *National Bank* v. *Commonwealth*, 9 Wall., 353.
" *Railroad Co.* v. *Peniston*, 18 Wall., 5."

(6.) " Police power authorizes all regulations tending to promote
" the public health, morals, security, and comfort of the community.
" The main subjects of police regulation may be enumerated as
" nuisances, markets, strays, vehicles, *the use of the streets*, the con-
" dition of public and private property, the sale of dangerous com-
" modities, the keeping of animals, the conduct of places of public
" resort, the prevention of fires and the observance of Sunday."

Horr & Bemis on Munic. Police Ord., § 212.

(7.) In *New Orleans Gas Co.* v. *Louisiania Light Co.*, 115 U. S., 650, HARLAN, J., in delivering the opinion of the Court, said, at p. 671:

" The grant of *exclusive* privileges to the plaintiff does not
" restrict the power of the State, or of the municipal government
" of New Orleans acting under authority for that purpose, to
" establish and enforce regulations which are not inconsistent with
" the essential rights granted by plaintiff's charter, which may be

" necessary for the protection of the public against injury, whether " arising from the want of due care in the conduct of its business, " *or from an improper use of the streets in laying gas-pipes*, or from " the failure of the grantee to furnish gas of the required quality and " amount."

And at p. 672:

" Whatever, therefore, in the manufacture or distribution of gas " in the City of New Orleans prove to be injurious to the public " health, the *public comfort*, or the public safety, may, notwith- " standing the *exclusive* grant to plaintiff, be prohibited by legis- " lation, or by municipal ordinance passed under legislative " authority."

(8.) In granting to a *water company* the right to lay its pipes in the streets, a city does not part with any power relating to the public health; and may construct a *sewer* wherever the public interest requires, without becoming liable to the water company for the expense attending the removal of its pipes to make room for the sewer.

Nat. Water Works Co. of New York v. *Kansas City*, 28 Fed. Rep., 921.
(Circuit Court, W. D., Missouri, Oct. 22, 1886, *per* BREWER, J.)
As cited in
2 *Dillon Munic. Corp.*, § 697 (4th ed.), note 2.
To the same effect see
Stein v. *Bienville Water Supply Co.*, 34 Fed. Rep., 145; affirmed 141 U. S., 67.

So a gas company empowered to lay its pipes in the streets of a city takes the risk of their location, and may be required to make such changes as public convenience or security requires at its own expense.

Matter of Deering, 93 N. Y., 361.

(9.) Even a grant of exclusive privileges does not restrict the power of the State to establish and enforce regulations not inconsistent with the essential right given to a company by its charter.

New Orleans Gas Co. v. *Louisiana Light Co.*, 115 U. S., 650.

(10.) The act of Indiana of 1891, prohibiting the transportation of natural gas through pipes at a greater pressure than 300 pounds per square inch, or otherwise than by its natural flow, has been very recently held to be a valid exercise of the *police power* of the State since natural gas is an intrinsically dangerous substance; and *the Legislature having determined what pressure is reasonable and safe, the courts cannot review its action.*

The act being merely a regulation of the use of property, is not a taking of it, within the meaning of Const. Ind., Art. I., § 21,

prohibiting the taking of property without just compensation, nor does it impair any vested rights nor conflict with Const. U. S., Fourteenth Amendment, providing that no State shall deprive any person of property without due process of law.

Jamieson v. *Indiana Natural Gas & Oil Co.*, 28 North Eastern Reporter (No. 1), p. 76 (Supreme Court of Indiana, June 20, 1891). S. C. 12 Lawyers' Reports Annotated, 652. See the elaborate opinion by ELLIOTT, J. (author of Elliott on Roads and Streets), collating cases.

(11.) It can admit, we submit, of no reasonable doubt that the Court can see upon a perusal of the act in question that it is fairly, justly and reasonably intended, convenient and appropriate to protect the public health, *e. g.*, from the deleterious effect of constantly tearing up of the streets, or serve the public comfort and safety, *e. g.*, from the danger arising from constant explosions and accidents.

It surely cannot be claimed—at least with any appearance of plausibility—that it appears from the face of the statute or from facts of which the Court takes judicial notice that the exercise by the Legislature of the police power is but a cover for a capricious invasion of private rights.

That being the case, the Court should certainly not interfere with the legislative discretion upon the subject.

(*a.*) In New York the *oleomargarine* statute was held unconstitutional by the unanimous judgment of the Court of Appeals, the Court holding that the oleomargarine statute was a denial of the liberty of contract secured to the citizens by the Constitution; that this right not only included freedom of the person from restraint, but the right to follow such industrial occupations as he might see fit, and that the act was a palpable invasion of private right, and not a legitimate exercise of the police power.

People v. *Marx*, 99 N. Y., 377.

(*b.*) On the other hand, in *Powell* v. *Pennsylvania*, 127 U. S., 678, substantially the same statute was held constitutional by the United States Supreme Court; the Court holding that the act was not in conflict with the Fourteenth Amendment of the Constitution and that *the Court would not question the discretion of the Legislature in the exercise of the police power, unless it appeared from the face of the statute or from facts of which the Court took judicial notice that the exercise of the power was but a cover for a capricious invasion of private rights.*

See the valuable paper on "*Liberty of Contract under the Police Power*," read before the American Bar Association at its Fourteenth Annual Meeting in Boston, August 26, 1891, by Frederick N. Judson of the St. Louis Bar.

(c.) *A fortiori*, in the present case, where the highest Court in the State of New York has held the Subway Act constitutional and a legitimate exercise of the police power, should the Supreme Court of the United States hold the same view.

FOURTH POINT.

The judgment below should be affirmed.

Dated New York, December, 1891.

DAVID J. DEAN,
JAMES HILLHOUSE,
For Defendant in error.

APPENDIX A.

PER CURIAM opinion of the General Term of the Court of Common Pleas for the City and County of New York, in *People of State of N. Y. ex rel. N. Y. Electric Lines Co.* v. *Squire as Commissioner*, in affirming the Special Term order appealed from (Record, pp. 23 and 24), reported in 14 Daly's N. Y. Common Pleas Rep. at p. 166:

"The learned judge who made the order appealed from, after a "careful examination of the law, denied the motion for a mandamus, "and has fully and very clearly given his reasons therefor.

"We have examined the questions raised by the appeal, and "fully agree with him, both in the conclusions to which he has "arrived, and the grounds on which such conclusions are based.

"A similar application was made to Mr. Justice *Freedman*, in the "case of *N. Y. Electric Lines Co.* v. *Crimmins*, and by him denied. "(MSS. Opinion, N. Y. Super. Ct., Sp. Term, Nov. 4, 1886)."

NOTE.—The MS. opinion by FREEDMAN, *J.*, in the case of *N. Y. Electric Lines Co.* v. *Crimmins*, delivered at Special Term in the Superior Court of the City of New York, on November 4, 1886, is in these words:

"THE N. Y. ELECTRIC LINES COMPANY

"*against*

"JOHN D. CRIMMINS AND OTHERS.

"AT SPECIAL TERM.

"FREEDMAN, *J.*

"As to the preliminary objection which has been raised, I am of "the opinion that section 605 of the Code of Civil Procedure does

"not protect the Electric Subway Commissioners against an "injunction which may be issued by this Court in a proper case.

"As to the merits of the motion, the rule is that courts will not "enjoin public officers in the discharge of their duties, unless mani- "festly acting in violation of law, and then only when by such "action and the surrounding circumstances the case is brought "within the special equitable jurisdiction of the Court. An injunc- "tion is only proper when there is no other adequate remedy at "law, unless injunctive relief is specially provided for by statute.

"The act under which the defendants proceed has been held by "Judge Allen, of the Court of Common Pleas, to be constitutional. "I shall follow his opinion as far as it goes, especially as, on a mere "motion, a statute will not, as a general rule, be declared unconsti- "tutional.

"In the next place, I cannot perceive that the defendants are so "manifestly acting in violation of the act from which they derive "their powers that they should be enjoined as prayed for.

"And in the third place, I entertain grave doubt whether the "plaintiff, upon its own showing, has made out a case of such irre- "parable damage as calls for the imposition of the equitable pow- "ers of the Court.

"Upon the whole case, as made by the papers on both sides, all "the equities claimed by the plaintiff are fully and circumstantially "denied by the defendants. Consequently even if the plaintiff has "some cause of complaint, its right to equitable relief against the "defendants is not so clear that the Court should interfere for "its protection in advance of the trial.

"The motion for an injunction during the pending of the action "should therefore be denied with $10 costs, and the plaintiff should "be left to establish its right to injunctive relief, if any it has, by "a regular trial of the issues.

"*Endorsed:* The N. Y. Electric Lines Co. *agt.* John D. Crimmins and others.

"Opinion, Freedman, *J.* Filed Nov. 4, 1886."

Appendix B.

Opinion of the Court of Appeals of the State of New York, in *People of State of New York ex rel. N. Y. Electric Lines Co.* v. *Squire, as Commissioner*, in affirming the General Term order appealed from (Record, p. 25), reported in 107 N. Y. Rep., 593:

Ruger, *Ch. J.:* The relator was incorporated in 1882 for the purpose of "owning, constructing, using, maintaining, and leasing lines of telegraph wires or other electric conductors for telegraphic and telephonic communication, and for electric illumination, to be placed under the pavements of the streets," etc., in the Counties of New York and Kings. Their organization was effected under chapter

265, Laws 1848, which by a general law authorized the formation of corporations of that character; and in 1883 it applied to and received from the Common Council of the City of New York, by virtue of the power conferred upon such council by chapter 397 of the Laws of 1879, permission to construct conduits and lay wires in certain streets of New York under certain conditions named in the ordinances, which, among other things, required that such work should be performed under the control and supervision of the commissioner of public works. The relator in 1883 also filed with the clerk of New York county certain maps, plans, and tabular statements, as required by the ordinance, and proceeded to collect the material and equipments necessary to build its structures, and transact its business. No further progress seems to have been made by the relator until July, 1886, when application was made by it to the department of public works of New York for permission to open some of the streets in the city for the purpose of laying therein its wires and conductors. This permission was refused upon the ground that the relator had not obtained the approval of the subway commissioners of New York to its plans and construction.

This proceeding was brought to obtain a peremptory mandamus requiring the commissioner of public works to grant a permit to the relator authorizing it to excavate in the streets of the city to enable it to construct conduits and lay electric wires and conductors therein. The application was denied at special term, and the general term, upon the appeal to that court, affirmed the order denying the writ. Section 1 of chapter 534 of the Laws of 1884, provides that "all telegraph, telephonic, and electric light wires and cables used in any incorporated city of this state, having a population of five hundred thousand or over, shall hereafter be placed under the surface of the streets, lanes, and avenues of said city." Section 2 requires that "every corporation * * * owning or controlling telegraph, telephone, electric, or other wires or cables * * * shall, before the first day of November, 1885, have the same removed from the surface of all streets or avenues in every such city of this state." And section 3 provides that in case the owners of such property do not comply with the provisions of the act within the time limited, the local governments of the said cities shall cause such wires, etc., to be removed and placed under ground. These provisions do not seem to have been impaired in any material respect by the subsequent legislation of 1885 and 1886, and, by express terms, this act applies as well to existing companies as to those thereafter to be formed.

By chapter 499, Laws 1885, it was provided that three persons should be appointed to constitute a board of commissioners of electrical subways in cities having a population exceeding 500,000. By section 2 such boards were charged with the responsibility of enforcing the provisions of the act of 1884, and it was made their duty to cause to be removed from the surface of the streets, etc.,

all wires and cables used in the business of such electric companies, and to put them under ground wherever practicable, and cause them to be there operated and maintained, and said act of 1884 was declared to be amended to conform to the provisions of this act. Section 3 of said act provided that "when any company operating, or intending to operate, electrical conductors in any such city, shall desire or be required to place its conductors or any of them underground * * * it shall be obligatory upon such corporation to file with said board of commissioners a map or maps, made to scale, showing the streets or avenues or other highways which are desired to be used for such purpose, and giving the general location, dimensions and course of the underground conduits desired to be constructed. Before any such conduits shall be constructed it shall be necessary to obtain the approval of said board of said plan of construction so proposed by such company." By section 10, "all acts and parts of acts inconsistent herewith are hereby repealed." These acts seem to have been intended to apply to all companies, and to whatever stage of their organization they may have reached.

It is not claimed by the relator that it has ever filed with the board of commissioners its maps and plans as required by said act, or that it has obtained from them an approval of such maps, etc., and it is therefore clear that section 3 of the act of 1885 constitutes an insuperable objection to the relator's application, unless, for some reason, it be adjudged to be void for unconstitutionality. The relator has met this question squarely, and challenges the constitutionality of the act upon several grounds, which may be summarized as follows:

1st. That it violates section 16 of article 3, in that it is a local bill, and embraces more than one subject not expressed in its title.

2d. That it violates section 17 of article 3, providing that "no act shall be passed which shall provide that any existing law, or any part thereof, shall be made or deemed a part of said act, or which shall enact that any existing law, or any part thereof, shall be applicable, except by inserting it in such act."

3d. That said act levies a tax upon such companies, in that it is provided that the cost and expenses of such board of commissioners are authorized to be assessed by the comptroller of the state, when paid by him, upon the several companies operating electrical conductors in any such city of the state which shall be required to place and operate its conductors under ground.

4th. That if said act of 1885 applied to the relator it was unconstitutional, as it impaired the rights which it had secured by virtue of the grant from the authorities of New York to construct conduits and lay wires and conductors in the streets of that city and its acceptance thereof.

We are of the opinion that none of the points taken by the appellant are tenable. It is convenient to consider these questions in the order in which they have been stated.

First—The act referred to is not subject to the condemnation expressed in section 16, article 3, for the reason that it is neither a private or local bill, nor does it embrace more than one subject. The three acts of 1884, 1885 and 1886 all relate to the same subject, viz., that of placing all electrical wires and conductors in cities exceeding 500,000 population under the surface of streets, etc., subject to the control of the local authorities; and no provision is incorporated in either of these acts which is not strictly incidental to the general object intended to be accomplished. They relate simply to the mode and manner in which the provisions of the several acts in relation to the location and removal of electrical wires and conductors shall be applied and enforced, and constitute but one subject of legislation. Neither is the act a local or private one within the meaning of the section referred to. Such was the decision of this court *In the matter of the N. Y. El. R. R. Co.*, 70 N. Y., 327, and *In the matter of Church*, 92 N. Y., 1. This act is general in its terms, applying to all cities in the state of a certain class, and to every corporation carrying on a business requiring the use of electrical wires or conductors in such cities. That the number of such cities is limited or restricted does not make the bill a private or local one within the constitutional meaning and intent of these words, was expressly decided in the cases referred to. How many companies there are to which this bill applies, we have no means of determining; but the fact that a general law is passed regulating the operations of all such companies, in cities of the class referred to, does not constitute it a private or local bill, although it may happen that such companies are all located in one or more cities of the state.

Second—Neither do we think the act obnoxious to the objection that it incorporates in its provisions a prior act without inserting such act therein. The act is neither within the letter nor spirit of the constitutional provision. There was no attempt to re-enact the law of 1884 by the law of 1885. The act of 1884 was a law by the force of its own enactment, and so continues. It has never been repealed or re-enacted. The act of 1885 treats that of 1884 as a valid and existing law, and purports simply to provide methods by which it may be more conveniently carried out and enforced. It might be better, perhaps, to have all the laws relating to this subject incorporated in a single act; but I apprehend it is no objection to a law, under the constitution, that other laws on the same subject exist in other volumes of the statutes, or that the arrangement and location of such laws are faulty, or perhaps intricate and awkward, or involve labor and trouble to determine what in fact the law is. The object and intent of the constitutional provision was to prevent statute laws relating to one subject from being made applicable to laws passed upon another subject through ignorance or misapprehension on the part of the legislature, and to require that all acts should contain within themselves such information as should be necessary

to enable it to act upon them intelligently and discreetly. It is obvious that it does not apply to an act purporting to amend existing laws, for in such a case no intelligent legislation could be had at all without a knowledge of the law intended to be amended. It must be presumed that the legislature is informed of the condition of a law which it is called upon to amend. It could never have been contemplated by the framers of the constitution that any legislator would remain ignorant of the provisions of a law which it is proposed to change, or would require the provisions of such a law to be transcribed into the proposed legislation to enable him to act upon it judiciously and intelligently. Such a construction would lead to innumerable repetitions of laws in the statute-books, and render them not only bulky and cumbersome, but confused and unintelligible almost beyond conception.

Third—The claim that this law is void because it imposes a tax on the companies referred to, cannot be maintained. The act of 1884 imposes the duty upon such companies to remove and cause to be laid under ground all such wires and cables as are required in their business, and there is no reason why such companies should not be subject to the payment of all expenses incurred in the construction of works required to carry on their own business. This question has received a practical construction in the legislation of the state by its laws imposing upon banking and insurance corporations the expenses incurred by the government in the management and regulation of such institutions and their business operations. It has never been supposed that these laws imposed a tax within the meaning of the constitution. A further answer to this point is found in the circumstance that, even if it be admitted that the law does impose a tax, it does not necessarily invalidate the other provisions of the statute. The comptroller of the state is required to pay their expenses in the first instance, and no question now arises over the liability of the companies until they are called upon, by the comptroller, to refund to him the amount of such expenses. This provision of the statute may be eliminated from it without impairing in the least the general scheme of the act, and upon well-settled principles, when this can be done, it affects so much of the act only as may be declared unconstitutional.

Fourth—The relator also claims that the act is obnoxious to the clause of the constitution which forbids the enactment of any law impairing the obligation of contracts. It may be said in reference to this claim that the contract itself provides that the work of removal and replacement, and of making excavations in the streets, avenues, etc., of the city by any telegraph company for the purpose of laying its wires, shall be subject to the control and supervision of the commissioners of public works, and such commissioners might well require in the exercise of their discretion, that the locality, time, mode, and manner of performing such work should be approved by the officers having the general supervision of that subject in the city,

before authorizing a single company, among the many claiming such privileges, to tear up its streets and construct trenches through its various thoroughfares and avenues at their own will and pleasure.

But we are of the opinion, for other reasons, that this legislation did not and was not intended to materially impair or restrict the enjoyment of the franchise secured by the relator. The necessity of these acts sprung out of a great evil which in recent times has grown up and afflicted large cities by the multiplication of rival and competing companies, organized for the purpose of distributing light, heat, water, the transportation of freight and passengers, and facilitating communication between distant points, and which require in their enterprises the occupation, not only of the surface of and air above the streets, but indefinite space under ground. This evil had become so great that every large city was covered with a net-work of cables and wires attached to poles, houses, buildings, and elevated structures, bringing danger, inconvenience, and annoyance to the public; extensive spaces underground were also required to lay pipes and build trenches and arches to transact the business of the various corporations requiring them. These works not only called for great skill to harmonize the various and conflicting claims of competing companies to rights above as well as beneath the ground, but a comprehensive plan and supervision to prevent the constant disruption of the streets and the interruption of travel. The necessity of a remedy for these public annoyances had long been felt, and it finally culminated in the enactment of the several statutes referred to.

These statutes were obviously intended to restrain and control, as far as practicable, the evils alluded to, by requiring all such wires to be placed under ground in such cities, and be subject to the control and supervision of local officers who could reconcile and harmonize the claims of conflicting companies, and obviate in some degree, the evils which had grown to be almost, if not quite, intolerable to the public. The scheme of these statutes was not to annul or destroy the contract rights of such companies, but to regulate and control their exercise. They did not purport to deny them any privileges theretofore granted, but they did require that they should be exercised with due regard to the claims of others, and in such a way that they should cease to constitute a public nuisance, and should be enjoyed in such a manner as to inconvenience and endanger the general public as little as possible.

That regulations of the character provided for in these acts are strictly police regulations, and such as no chartered rights can nullify or overrule, is too clear to admit of dispute. The primary and fundamental object of all public highways is to furnish a passage-way for travelers in vehicles, or on foot, through the country. (*Bouv. Inst.*, § 442). They were originally designed for the use of travelers alone; but in the course of time, and in the interest of the general prosperity and comfort of the public,

they have been put, especially in large cities, to numerous other uses. But such uses have always been held to be subordinate to the original design and use. Thus they have been appropriated, in recent times, for the reception of sewers, water-pipes, gas-pipes, pipes for heating and manufacturing purposes, underground railroads, trenches for wires for telegraph, telephone, and other purposes, which all require in their construction the disruption of the pavements, and the temporary interruption, at least, of the rights of travelers in the public highways. The due and orderly arrangement of the various and conflicting claims to privileges in the streets of large cities would seem imperatively to require the creation of a neutral board, with controlling authority, to form a comprehensive plan by which these various enterprises might be harmonized and carried on without detriment to each other, and with due regard to the rights of the public. Such power is preeminently a police power, and it is within the legitimate authority of a legislature to delegate its exercise to municipal corporations.

An elementary writer has said that "the police of a state, in a comprehensive sense, embraces its system of internal regulation by which it is sought, not only to preserve the public order and to prevent offenses against the state, but also to establish, for the intercourse of citizen with citizen, those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own, so far as is reasonably consistent with a like enjoyment of rights by others" (*Cooley, Const. Lim.*, 572).

Justice SHAW said in *Commonwealth* v. *Alger*, 7 Cush., 84, that it was "a well-settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it shall not be injurious to the rights of the community. All property in this commonwealth * * * is held subject to those general regulations, which are necessary to the common good and general welfare."

Chief Justice REDFIELD, in *Thorpe* v. *Rutland and Burlington Railroad Co.*, 27 Vt., 149, says: "This police power of the state extends to the protection of the lives, limbs, health, comfort and quiet of all persons, and the protection of all property within the state."

The right to exercise this power cannot be alienated, surrendered, or abridged by the Legislature by any grant, contract, or delegation whatsoever, because it constitutes the exercise of a governmental function, without which it would become powerless to protect those rights which it was especially designed to accomplish. Thus it was held in *Presbyterian Church* v. *City of New York* (5 Cow., 540), where the corporation had granted, with a covenant for quiet enjoyment, a piece of land to the plaintiff to be used for church purposes and as a cemetery, that the power of the municipal government to pass an ordinance forbidding the use of such premises as a cemetery for

the interment of the dead constituted no breach of the covenant. It was said that "the defendants are a corporation, and in that capacity are authorized by their charter and by-laws to purchase and hold, sell, and convey real estate in the same manner as individuals. * * * They are also clothed, as well by their charter as by subsequent statutes of the State, with legislative powers; and, in the capacity of a local legislature, are particularly charged with the care of the public morals and the public health within their jurisdiction. * * * They had no power, as a party, to make a contract which should control or embarrass their legislative powers and duties." To the same effect is *People* v. *Morris* (13 Wend., 325).

In *Wynehamer* v. *People* (13 N. Y., 421), Judge COMSTOCK says, in speaking of rights of property: "The substantial right cannot be destroyed; its enjoyment is not an offense. * * * At the same time the mode of enjoyment, in its broadest sense, is subject to legislation, though it be affected very injuriously, provided a substantial right is left."

The claim made by the relator in this case would authorize it to tear up the streets of the city at such times, in such places, and under such circumstances as it might itself determine, regardless of the public convenience and welfare and the rights of other claimants to the occupation thereof, and place them beyond the reach of all power by the Legislature to regulate the mode and manner of the enjoyment of their rights.

We do not think such a claim can be sustained. It is not within the terms of their contract; and if it were, it is still subject, in the respects mentioned, to the police power of the state.

The order of the General Term should be affirmed, with costs.

All concur.

Order affirmed.